

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

995

JOINT APPENDIX

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,017

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

*APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION*

No. 21,018

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

*PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION*

United States Court of Appeals

for the District of Columbia Circuit

FILED *Oct. 2,*
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA

Appellant

v.

Case No. 21017

FEDERAL COMMUNICATIONS
COMMISSION

Appellee

PREHEARING STIPULATIONS

The parties to the above proceeding have entered into a stipulation stating that the following questions are those presented by the instant appeal:

1. Whether the refusal to grant the "exemption request" upon the showing made violated either Section 326 of the Communications Act of 1934, as amended, or the First Amendment to the United States Constitution.
2. Whether the refusal to grant the "exemption request" upon the showing made was arbitrary, capricious and contrary to the Commission's own 1960 "Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry."
3. Whether the Commission's refusal to grant the renewal application on the terms and conditions requested constituted an unlawful denial of the application without hearing, contrary to Section 309(e) of the Communications Act of 1934, as amended.
4. Whether the Commission's denial without hearing of the "exemption request" constituted an unlawful modifica-

JA 2

tion of the outstanding FM license, contrary to the provisions of Section 316(a) of the Communications Act of 1934, as amended.*

5. Whether, upon the showing made, the Commission's refusal to grant a hearing on the "exemption request" under Section 73.242(c) of the Rules, was arbitrary, capricious and contrary to law.

FILING OF JOINT APPENDIX

Counsel for the parties further stipulate that the joint appendix will be filed simultaneously with the filing of the Reply Brief, or, if Appellant files no Reply Brief, then within 15 days of the filing of the Brief of Appellee.

References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court. In the printing of the joint appendix, there will be set forth, in addition to the consecutive numbering of the pages of the joint appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the briefs.

Respectfully submitted,

**BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA
(Appellant)**

By Ben C. Fisher
703 Perpetual Building
Washington, D. C. 20004

**FEDERAL COMMUNICATIONS
COMMISSION (Appellee)**

By John Conlin
Associate General Counsel

June 28, 1967

*Appellee-respondent does not concede that Issue No. 4 is properly before the Court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA,
Petitioner

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS
COMMISSION,

Respondents

Case No. 21018

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Respectfully submitted,

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA
(Petitioner)

By Ben C. Fisher
703 Perpetual Building
Washington, D. C. 20004

UNITED STATES OF AMERICA
(Respondent)

By Howard E. Shapiro
Antitrust Division
Department of Justice

FEDERAL COMMUNICATIONS
COMMISSION (Respondent)

By John Conlin
Associate General Counsel

June 28, 1967

Appellee-respondent does not concede that Issue No. 4 is properly before the Court.

[Filed July 10, 1967]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,017

September Term, 1966

Buckley-Jaeger Broadcasting
Corporation of California,
Appellant,

v.

Federal Communications
Commission,
Appellee.

BEFORE: Burger, Acting Chief Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

[Filed July 10, 1967]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,018

September Term, 1966

Buckley-Jaeger Broadcasting
Corporation of California,
Petitioner,

v.

United States of America and
Federal Communications
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Respondents

BEFORE: Burger, Acting Chief Judge, in Chambers.

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[1]

[Received February 8, 1965]
[F.C.C. - Office of the Secretary]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re: Buckley-Jaeger Broadcasting
Corporation of California
KKHI-AM, San Francisco, California
KKHI-FM, San Francisco, California

To the Commission:

**REQUEST FOR EXEMPTION
PURSUANT TO SECTION 73.242(C)**

* * *

[2]

KKHI-AM is the *only AM facility* programming *exclusively* the "Music of the Classics" in the sixth market, the San Francisco-Oakland area, and in all Northern California. KKHI-AM *and* FM represent the only combined fulltime classical operation in the same area. Correspondence and other contacts prove that we also have a surprising number of steady listeners outside our 0.5 mv/m area. Our penetration to the South reaches Monterey and Carmel. In the East we retain a steady audience in the Sacramento region. In the North we have many regular listeners in Oregon, Washington and Idaho. Almost all these people say they listen to KKHI because our fulltime classical music format is not accessible on their local radio dials—or if so, is unsatisfactory when compared with ours.

* * *

[3]

* * *

KKHI's *AM and FM* audience is simply not divisible. They listen constantly to us in a variety of locations and circum-

stances. Basically, many of our listeners prefer to use FM since it produces a higher quality sound for the "music of the classics." Nevertheless, more important to the vast majority of KKHI listeners is the fact that our obviously high level program service, as documented by the attached program schedule, is available at all times either on AM or FM so they can hear us:

- (a) at home on either AM or FM depending on type of set used;
- (b) on AM (or in some cases-FM) while travelling by automobile at any time including the important morning and evening periods 6:00 AM-9:00 AM and 3:00 PM-6:00 PM (most cars, of course, are equipped with AM sets only);
- (c) at any place while travelling—or away from home or auto—on AM portable sets (which most are today), on FM portables, or combination AM-FM portables.

[4]

* * *

Buckley-Jaeger acquired KKHI-AM and FM in March of 1964 and soon thereafter in May, 1964 conducted a community survey in an effort to determine the characteristics of KKHI listeners. Questionnaires were sent to 600 KKHI listeners picked at random from those who had previously communicated with the station on a variety of subjects. Within 18 days (including mail delivery time on both ends), a 75% return had been realized—an astonishing percentage of return for any survey—demonstrating the deep interest and sensitive reactions of classical music listeners. These

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[5]

returned questionnaires were tabulated by a group of Business Management Graduate students at San Jose State College, in California. This survey showed KKHI listeners

reporting the following breakdown regarding "Type of Radio" on which they listen:

Type of Radio Set Used at Various Times		
AM only	37%	Total AM - 37% plus 46%...83%
FM only	17%	Total FM - 17% plus 46%...63%
AM and FM both ...	46%	

Here is the breakdown relating to "Place of Listening."

Place of Listening

Home	96%
Auto	57%
Home and Auto	55%
Other	13%

Analyzing the above breakdown of KKHI-AM and FM listening habits—the combination of "Type of Radio Set Used" and "Place of Listening"—and the manifold combinations of listening circumstances deriving therefrom—we can fairly draw the following conclusions. If we are forced to program classical music fulltime on FM-only and use another format 50% of the time on AM, it's instantly apparent that during those hours we'd lose the entire segment of AM listeners indicated above because of "Type of Set Used" and/or "Place of Listening—In or Out of Home."

[6]

We no longer would be able to provide a large segment of our specialized audience with the very service they want. Furthermore, our AM listener segment is today, and will be for years to come, KKHI's bulwark in securing sufficient advertising revenue to operate. Conversely, if forced to program classical fulltime on AM-only and use a different format on FM 50% of the time, we'd lose the entire group of FM listeners shown above—with similar disastrous consequences, both audience-wise and economically.

Both components—AM *and* FM—are absolutely essential if we're to continue to preserve the whole of KKHI. Until

the time arrives when practically all radio listeners in our coverage area are equipped with both AM and FM sets—in homes, automobiles, and in portables—imagine the chaotic, almost absurd situations this Rule would produce for KKHI listeners if we could program the “Classics,” say, only on FM.

Our audience would be tuned to KKHI-FM-only, listening to continuing musical works—the Saturday Night Opera, long symphonies presented daily, Concertos, other regular programs, or our *live* broadcasts of concerts by the San Francisco Symphony, Oakland Symphony, Philadelphia Symphony, or the New York Philharmonic. On leaving home for any reason while travelling to and from work by auto, while

[7]

travelling on pleasure trips or locally by car, while at a friend’s house (perhaps no FM radio there), at the beach, in the park, in the back yard, on the sun deck—yes, even in many stores, business offices and plants—in all these situations where FM sets are available to only a very tiny fraction of these listeners, KKHI’s *exclusive* classical music service would be unobtainable.

In any of the above circumstances they would be arbitrarily severed from their desired programming—KKHI’s “Music of the Classics.” Further, in numerous homes where classical music is widely or exclusively favored, the FM receiver is a high-quality permanent installation in a living room, den, or other location. Many of these homes don’t have a second FM receiver, not even a portable—so ludicrously, if a listener in this circumstance left his own living room or den and wished to hear the remainder of the San Francisco Symphony on FM in an upstairs room or on his own front porch—in many cases he’d be deprived of the choice—although his home would be listed as “FM equipped.”

He probably would own three or four AM-only receivers, but the San Francisco Symphony would not be on KKHI-AM.

Again in September, 1964 KKHI-AM and FM surveyed its audience via questionnaires to 1,600 listeners, querying them regarding their tastes in all music categories. Again an astonishing return! 1,100—or 70%—responded this time!

[8]

An unprecedented audience response from people who have nothing to gain but listening enjoyment and are willing to help us learn more about our audience so that we can continue to provide them with the finest in the "Classics."

In a ratio of 40 to 1, and in the strongest possible manner, these listeners unequivocally stated their desire for KKHI-AM-and-FM to remain exactly on its present program format of classical music. Almost all stated bluntly—"Don't change a thing!"—or other equivalents. (The survey material and responses, or a digest of them, is available to the Commission staff if they wish.) From these and other audience contacts resulting in intimate knowledge of their tastes, we're certain we'll receive a deluge of complaints from our listeners if we must program differently on FM or AM.

Two alternatives are open: Adopt an entirely different format *or* do the same type of programming, but with different selections. As will later appear, the latter alternative is shockingly wasteful and would really involve playing the same music. But what about offering a "diversity of program offerings," a different type of service. In San Francisco this becomes ridiculous. There are only so many possible program formats. With such a variety and multiplicity of San Francisco program services currently on both AM and FM, what can possibly be accomplished by

[9]

eliminating for a major part of KKHI's audience the availability of our fulltime *exclusive premier classical music programming* in a major market area with a population over four million?

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Twenty-three AM stations compete for audience in our coverage area, but there is only one KKHI-AM and FM—programming classical music, day and night. The remaining station formats include:

- Top-40 Music
- Middle of the Road Popular Music
- Network Affiliates
- Foreign Language
- Negro
- Country and Western Music
- Background Music
- Religious Programs
- Mostly Talk Programs—some music
- Talk and News Programs
- “Better” Music “a la” WPAT New York

* * *

[12]

* * *

The massive Bay Area radio audience looks to “The Classic Stations”—KKHI-AM and FM—for the finest in music. This audience is *responsive, intelligent, deeply interested and sensitive.*

KKHI listeners are predominantly adult. 79% over 21. 53% of these adults are 21-49 years. They are well educated—with 65% of the male heads of household having a degree. 91% have some college education. One out of every four heads of household is a professional—a doctor, lawyer, teacher or member of the clergy—a reflection of the high education level. KKHI listeners attend concerts, operas and recitals regularly—29% in a sample week; 60% in a sample month. Last year, more than 2,500,000 people attended those serious music events in San Francisco—compared with 1,571,000 attendance for Giants baseball.

For several years the Commission has emphasized the importance of local stations “probing the community” to ascertain its desires and needs. KKHI-AM and FM *have probed*

the San Francisco community and its environs exhaustively, honestly, with no reward of any kind offered listeners for responses. Their reward would be a continuation of their favorite and exclusive fulltime "Music of the

[13]

Classics" programming on both KKHI-AM and FM. Our reward, as owners and broadcasters, is what we believe to be the quickest, most staggering percentage response ever produced by any radio station survey. We venture the opinion that probably no other radio stations could supply the Commission with the type of audience reaction and analysis that we can. Such "community probing" will be a continuing practice. We hope the Commission will now take note of the responsiveness of our audience to our community surveys. We are prepared to conduct any future survey to prove our case in cooperation with the Commission.

The Commission must also offer aid and encouragement to broadcasters like KKHI-AM-and-FM who, at great expense (from \$2,000 to \$2,400 per performance) and without a penny of profit, broadcast *live* the concerts of outstanding orchestras such as the San Francisco Symphony and the Oakland Symphony. The Commission must encourage and foster good radio of our type—especially when it's the only AM service available and where exceptionally large audience percentages listen both on AM and FM. Quality radio needs all possible consideration and assistance from the Commission if it is to prosper among the ever increasing number of AM-only and FM-only stations and to withstand the extremely powerful impact of TV. The audience "pie" can only be cut in so many

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pieces. The law of supply and demand—in Radio-TV as in everything else—is inexorable.

Whether we have a new program format (which isn't needed) or do the same type programming without "duplication," there still is involved a public interest question of

very basic economics. Does the marginal benefit of this new programming justify the cost?

“Program duplication” means either simultaneous broadcasting or the broadcasting of an FM program within 24 hours before or after it’s broadcast over AM. Program-wise, therefore, we could continue our classical format on both AM and FM and meet the requirements of the Rule—but this would necessarily be done by operating another “one-half” of a radio station with a large immediate expenditure for additional studio and control room facilities which we estimate in the area of \$23,000, and very heavy permanent additional staff costs which are detailed herein later.

KKHI has relatively small quarters, as do most present-day radio stations. Our two small studios are currently in use for a variety of purposes practically 100% of the time—regular musical programs, news, the production of a broad range of special features, interviews, pre-recorded programs. In addition, KKHI is the West Coast origination point for the Mutual Radio Network’s Pacific leg of stations. KKHI feeds West Coast Mutual stations numerous regular newscasts each day plus a variety of other program features

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including network religious programs. As we see it now, it would be impossible to schedule our regular AM programs, all other daily operations, and our Mutual Network feeds within our two-studio setup and also have facilities to broadcast unduplicated FM programs 10 hours daily, seven days weekly. Hence, the need for new studio and control room facilities. There is even a great question as to whether we have space for such additional facilities in our present quarters; and renting separate space, if necessary, would be still another added heavy burden.

Much more serious than that large but one-time cost, however, would be the *permanent* and *steadily rising* cost of required additional staff. Our present staff consists of Chief Engineer, 4 technicians, 4 announcers, and a Program Direc-

JA 15

tor whose time is now practically 100% occupied with KKHI-AM and FM and Mutual Network obligations.

Were we to operate KKHI-FM (or AM) unduplicated 10 hours daily, 7 days weekly, the following additional staff and costs would be required under present union agreements and necessary staffing procedures.

Cost for FM-only (or AM-only) operation. 50% duplicated. 50% unduplicated. Based on 10-hour broadcast day, 7 days weekly. 70-hours weekly.

	Annually
2 Fulltime Announcers - \$10,400 each	\$20,800
2 Fulltime Technicians - \$10,400 each.....	20,800
Announcers Overtime - 416 hours yearly @ \$8.00	3,328
Technicians Overtime - 416 hours yearly @ \$8.00	3,328

(contd.)

[16]

5% Pension and Welfare Fund Payments

on above \$48,256	2,414
Music Librarian and Programmer - \$5,200	5,200
Secretary-Traffic Girl-Bookkeeper - \$5,200	5,200
Vacation Costs Yearly	2,800
Company-paid Payroll Taxes-State and Federal on \$61,456	<u>3,100</u>
	\$66,970

Our experience in top major market cities with costs and union contracts, together with present contractual commitments for almost three years ahead indicate the above costs would rise in the second year to \$69,870 and in the third year to \$72,770.

* * *

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[18]

* * *

With specific reference to San Francisco there are now 23 AM and 34 FM stations within the coverage area of KKHI-AM and FM. If and when the Commission's rule goes fully into effect, the number of independently programmed radio stations—57—either AM-only or FM-only—will have been quintupled when compared to the number of AM stations—11—originally serving the same area before FM's birth. It is impossible to see anything except audience and financial chaos for many AM-only and/or FM-only broadcasters in such a situation. Does the Commission really believe that this market can support 57 radio stations? The 1963 FCC Financial Report lists 10 independently owned

[19]

FM stations in the San Francisco area (Table 12), with a total gross of \$483,420, *and with losses of \$138,968*. Increasing competition by the addition of all the commonly owned AM-FM stations doesn't make sense!

* * *

[22]

* * *

Certainly with 57 AM or FM stations in KKHI's service area (without regard to television), no dearth of diversified program fare is evident. In short, the disadvantages inherent in this sudden addition of new FM competition to existing San Francisco stations far outweighs whatever advantages might accrue to the FM industry by requiring more independent FM programming.

* * *

[Rec'd FCC 8/20/65]

[59]

EXHIBIT NO. 13

KKHI-FM RENEWAL

**SECTION IV, PAGE 3, PARAGRAPHS 8(a), 8(b), 8(c).
REQUEST FOR EXEMPTION FROM SECTION 73.242**

We, of course, recognize the existence of the Commission's Rule regarding 50% non-duplication on FM effective October 15, 1965. However, we have requested an exemption pursuant to Section 73.242(c), which for the moment has been granted to December 31, 1965. We hereby request a further exemption for the full term of our license renewal period. The Commission has stated that it will consider these requests by September.

The required filing date for this KKHI-FM renewal application is September 1, 1965. Since the Commission will not act until later that month on our exemption request, we hereby renew our request and urge the Commission to consider each of the matters herein raised. We are ready to establish, in a hearing if necessary, that the public interest will be served by the grant of our exemption.

Pursuant to our responsibilities as licensee, we have determined from surveys of public desires and personal contacts with members of the community, that continued 100% duplication of our quality music programming would best serve the interests of our listeners. As a specialized good music station—there are only a few in the country comparable—we do not try to reach the entire audience available in San Francisco. But within the group normally interested in our type of high

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quality music, there is general agreement that continued duplication is desirable.

For this reason, we believe the Commission should grant us an exemption for the full term of our license. If the

Commission is unable to agree with our exemption request, we demand a hearing to demonstrate the public interest considerations favoring continued duplication for the renewal term.

We, furthermore, challenge the Commission's authority under general rule making activity to force *KKHI-FM* arbitrarily to program separately 50% of our broadcast day. The selection of program material is uniquely a function of license judgment. This judgment necessitates a sensitive consideration of the broadest imaginable range of local program format types and an understanding of widely varying degrees of community needs, local desires, other radio services. To achieve this, we participate in community affairs, we canvass the wishes of the listening audience served and we seek out the opinions of many leading public service, civic and cultural figures in San Francisco.

* * *

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* * *

There will be no waste of valuable spectrum space, KKHI's AM and FM audience is simply not divisible. They listen constantly in a variety of locations and circumstances. Most important to the vast majority of our listeners is the availability of our high-level program service at all times either on KKHI AM or FM so they can hear us:

- (a) at home on either AM or FM depending on type of set used;
- (b) on AM (or in a few cases-FM) while travelling by auto at any time (most cars, of course, are equipped with AM sets only);

[70]

- (c) at any place while travelling—or away from home or auto—on AM portables, or combination AM-FM portables.

(d) at a place where one or the other medium is not received satisfactorily.

Furthermore AM-FM classical music listeners are well aware of the difference between AM and FM. Many good music fans have expensive FM sets installed just to receive the "Music of the Classics." They are sufficiently aware of the technical advantages of FM so as to make obvious the fact that FM as a medium would not be stunted or its growth delayed were KKHI to continue duplication. Listeners will deliberately purchase the FM sets to receive KKHI-FM. Nevertheless, many of these same persons own AM sets and wish to continue to receive the service on AM also. Normally this stems from the circumstances and location of the listener. Other times though, the choice of AM or FM depends on reception characteristics in the area involved. Thus, it is fair to state that being able to broadcast on both AM and FM gives KKHI a broader based audience, and enables it to reach more listeners. We want to continue providing *both* AM and FM service because our listeners ARE the PUBLIC INTEREST, CONVENIENCE AND NECESSITY. We know that our prominent citizens, civic and community leaders . . . various musical, artistic and cultural groups and their directors . . . public-service-minded individuals support this request.

Buckley-Jaeger acquired KKHI-AM and FM in March, 1964 and in May conducted a community survey to determine the

[71]

qualitative characteristics of our audience. Questionnaires were sent to 600 KKHI listeners chosen at random from those who had previously communicated with the station. Within 18 days, a 75% return had been realized—astonishing for any survey—demonstrating that our "Classics Stations" audience is responsive, interested and sensitive. KKHI listeners reported the following breakdown:

**TYPE OF RADIO SET USED
AT VARIOUS TIMES**

AM only	37%	Total AM - 37% plus 45%...83%
FM only	17%	Total FM - 17% plus 36%...63%
AM and FM both	46%	

Here is the breakdown relating to "Place of Listening."

**PLACE OF LISTENING—
IN OR OUT OF HOME**

Home	96%
Auto	57%
Home and Auto	55%
Other	13%

Analyzing these *KKHI-AM and FM* listener habits—the combination of "Type of Radio Set Used" and "Place of Listening-In or Out of Home"—and the manifold combinations of listening circumstances deriving therefrom—we can fairly draw the following conclusions. If we're forced to abide by the Rule, it's instantly apparent that either way we'd lose the entire segment of either AM or FM listeners indicated above because of "Type of Set Used" and/or "Place of Listening-In or Out of Home." We'd no longer be able to provide a large segment of our specialized audience with the very combined service they want.

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Our audience, let us say, for example, would be tuned at home to KKHI-FM only, listening to certain classical musical works. On leaving home for any reason, KKHI's particular selections would be unobtainable except in a fraction of cases. The public would be arbitrarily severed from their desired programming.

Further — in numerous homes — the FM receiver is a high-quality permanent installation in a living room or special location. If a listener in this circumstance left his own living room and wished to hear the remainder of a certain program in an upstairs room or on his own front porch in

numerous cases he'd be deprived of the choice because his other radios would be AM.

Again in September, 1964 KKHI-AM and FM surveyed its audience via questionnaires to 1,600 listeners, querying them regarding their tastes in all categories. Again an astonishing return. 1,100 – or 70% – responded this time! An unprecedented audience response from people with nothing to gain but listening enjoyment and who were willing to help us learn more about our audience so we could continue to provide them with the finest in the "Classics." In a ratio of 40 to 1, and in the strongest possible manner, these listeners unequivocally stated their desire for KKHI-AM-and-FM to remain exactly on its present program format of classical music. Almost all stated bluntly – "Don't change a thing!" – or other equivalents. (The survey material and responses, or digest of them, is available to the Commission staff).

[73]

KKHI listeners are predominantly adult. 79% are over 21. 52% are between 21-49 years. They are well educated, – 65% of male heads-of-household is a professional – a doctor, lawyer, teacher, member of the clergy – a reflection of the high education level. KKHI listeners attend concerts, operas and recitals regularly – 29% in a sample week; 60% in a sample month. In the previous year, more than 2,500,000 people attended serious music events in San Francisco – compared with 1,571,000 attendance for Giants baseball.

When Buckley-Jaeger commenced operation of KKHI-AM-FM in March, 1964 its primary objective was to program as many outstanding features as possible in the "Music of the Classics" field. We recognized the San Francisco-Oakland area as one of the most cultural large-city markets in the United States. It has two outstanding symphonies – the San Francisco Symphony Orchestra under the leadership of Josef Krips, and the Oakland Orchestra under the direction of Gerhard Samuel.

San Francisco also supports an Opera — second only to the New York Metropolitan. It has an outstanding Ballet Company. In the 9-county Bay Area there are dozens of other symphony orchestra organizations — many originating in the music departments of our colleges and universities. The Bay Area is a center of education and supports almost 100 colleges, universities and junior colleges. All this provides a large potential audience for a classical music combined AM-FM operation.

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In the 1964-65 season *KKHI-AM and FM* broadcast nine concerts of the San Francisco Symphony, originating *live* from the War Memorial Opera House. These concerts can be heard *only* on *KKHI-AM and FM*. They hold great interest because of the small Opera House capacity; and there's an active subscription list of over 35,000 Bay Area residents who strongly support this world-renowned organization. We're planning the same schedule for the 1965-66 season.

KKHI-AM and FM will present *live* all next season's concerts of the Oakland Symphony Orchestra — an outstanding professional organization — which in 1964-65 enjoyed the most successful season in its history. Eight concerts were broadcast *live* last year by *KKHI-AM and FM* from the Oakland Civic Auditorium Theatre.

Last Season we also carried — exclusively in Northern California — the complete series of *live* broadcasts of the New York Philharmonic from Lincoln Center in New York — for 34 consecutive Sundays. This series is scheduled for next season also.

And on Sunday evenings *KKHI-AM and FM* last year broadcast the famed Philadelphia Symphony Orchestra for 26 consecutive weeks. *KKHI-AM and FM* will broadcast the Boston Pops Orchestra under Arthur Fiedler during the 1965-66 Season instead of the Philadelphia Symphony.

In addition to all the above Symphonies *KKHI-AM and FM* will present the famed New York Metropolitan Opera — the entire season of 20 performances *live* beginning December 4, 1965.

In addition we present a daily broadcast fare of "Music of the Classics" — covering the complete range of the great recorded symphonies, concertos, tone poems, suites, favorite arias and choruses from the World of Opera, complete operas, the works of the Romantic composers, piano concert music, anniversary programs of composers and artists, daily programs featuring a different composer's life and works, and programs with specialized appeal such as the Japanese and Western composers played by Japanese artists and orchestras, music of the Franklin Era plus items of "Frankliniana," Viennese operattas, etc.

KKHI aims for consistency in program pattern so our listeners will know at any time — on *either* the AM or FM band — where they can find their favorite "Music of the Classics." KKHI represents the only combined full time AM-FM Classical Music programming in San Francisco-Oakland and all of Northern California; and we have a surprisingly large audience outside our local area — in the South to Monterey and Carmel, in the East to Sacramento, to the North in Oregon, Washington, Idaho, even Alaska. We've received numerous indications that these people listen to KKHI because full time classical music is not accessible on their local radio dials, or if so, the service is

unsatisfactory when compared with ours.

Now, what if KKHI were to establish an entirely different format and musical style? In San Francisco this becomes ridiculous. There are only so many possible program formats. With the variety and multiplicity of San Francisco program services currently on AM and FM, what material benefit can possibly be accomplished by eliminating for a very large part

of KKHI's *AM and FM* total audience the availability of our full-time *exclusive premier classical music programming*? What other unique and meaningful programming would we provide?

23 AM stations compete for audience in our coverage area, but there is only one full-time KKHI-AM and FM — programming "Music of the Classics" day and night. The remaining stations feature every possible program format including the following:

- Top-40 Rock and Roll
- Middle of the Road Pop Music
- Network Affiliate Services
- Foreign Language
- Negro
- Country and Western Music
- Background Music
- Religious Programs
- Talk Programs with some music
- Talk and News Programs
- "Better" Music "a la" WPAT New York

There are 34 FM stations in our coverage area, duplicating most of the above and offering additional "variety" formats. What new format could KKHI-FM adopt that would better satisfy our audience?

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Of course, the Commission can say that "KKHI, under the Rule, *can* continue playing classical music on both AM and FM at all times during their broadcast days." This means however that while "classical music" would be available on both KKHI bands, it would be *different* classical music at a given moment. There is absolutely no public demand for this type of non-duplication. Its marginal utility of offering different classical selections part of the time, would be far outweighed by the substantial expense of separate programming.

Though 50% of the material would be technically different, the style, scope, format, approach and attraction, would

be the same. Thus, such separate classical programming could not constitute a truly different format or programming effort. The basic purpose of the non-duplication rule would not therefore be applicable.

As indicated above, our listeners have shown no interest in separate classical programming merely to have separate selection part of the day.

We believe the Commission should recognize broadcasters like KKHI-AM and FM who, at great expense broadcast *live* the concerts of outstanding orchestras such as the San Francisco and Oakland Symphonies, the New York Philharmonic, and the New York Metropolitan Opera. The Commission should encourage and foster good radio of our type by accepting our rational judgment that the public prefers duplicated programming.

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We believe the Commission overlooks *our* responsibility by attempting to force standardization upon us. Such broad general action and standardization fails to take into account local relevant factors such as the broadest possible diversity of programming in San Francisco, the larger number of stations, other special market conditions, our highly specialized, exclusive AM-FM classical music program service, audience desires and their expressed demands for continuation of same and the opinions of prominent citizens and leaders in public life regarding the unusual reputation and position of KKHI-AM and FM in the San Francisco Bay Area.

We therefore respectfully request that we be granted an exemption for the term of our FM renewal. If the Commission cannot do so on the basis of this showing, we respectfully request a hearing to demonstrate that the public interest will be served by such duplication.

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Fisher, Wayland, Duvall and Southmayd
703 Perpetual Building
1111 E Street, N.W.
Washington, D.C., 20004

October 20, 1965

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Waple:

On February 1, 1965 Buckley-Jaeger Broadcasting Corporation of California, licensee of Stations KKHI-AM and FM in San Francisco, filed a request for exemption from the provisions of Section 73.242 which require that FM stations devote no more than 50% of their average week to duplicated AM programs. That request for exemption is still pending.

On August 20, 1965, Buckley-Jaeger filed its application for renewal of licenses of both KKHI-AM and KKHI-FM. In connection with the renewal of KKHI-FM, the applicant again expressly requested an exemption pursuant to Section 73.242(c). An extensive showing was made in the renewal application as well as in the original petition for exemption in support of the request.

In the FM renewal application, Exhibit No. 13, KKHI-FM stated that based on surveys of public desires and personal contacts with members of the community, the San Francisco area prefers that 100% duplication between the AM and the FM stations continue. Specifically, it was stated:

"As a specialized good music station - there are only a few in the country comparable - we do not try to reach the entire audience available in San Francisco. But within the group normally interested in our type of high quality music, there is

general agreement that continued duplication is desirable."

To further support this conclusion the applicant conducted a survey among its listeners in September to determine conclusively their preference. There is attached hereto an amendment to the

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renewal application which sets forth the results of this survey. The survey conclusively establishes that the KKHI-AM-FM listeners want the stations to continue 100% duplication and not change their program policy in any material way. The amendment consists of the following material.

1. A copy of the letter and questionnaire which were sent to 2,000 KKHI-AM-FM listeners. These listeners were chosen at random from station mail of all types. Forty-one of the questionnaires were returned for defective mailing addresses. Thus, actually 1,959 questionnaires were sent out.
2. The results were tabulated on IBM tabulation equipment in the data processing department of Chabot College, Hayward, California. A copy of the IBM report is attached.
3. A blank questionnaire has been prepared filling in the results of the actual survey. 1,448 persons, or 73.71%, responded to the questionnaire by the cut off date, September 27, 1965. This extremely high response is itself testimony of the importance that these listeners place upon classical music and the intensity of their desire to keep KKHI-AM-FM operating without change. On the basic question as to whether they would prefer KKHI to continue as a combined operation broadcasting the same classical music, 1,388 persons answered "Yes" and 23 answered "no."
4. The detailed answers to the various questions are analyzed in the letter of Mr. Elmer O. Wayne, general manager of KKHI-AM-FM, dated October 15, 1965, a copy of which is attached. This analysis shows that KKHI listeners listen on both AM and FM and in a variety of places, including their homes, automobiles, at work, in stores, restaurants,

and elsewhere. Almost unanimously they opposed a different type of music being offered on FM 50% of the time.

5. A large number of the persons who responded added personal comments to the questionnaire. It is impossible as a matter of space to reproduce every single one of these comments, but there is attached a series of sample comments which typically reflect the opinion of the KKHI-AM-FM listeners in the San Francisco Bay area.

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1448 returned out of 1959 (Mon., 9/27, cut-off) 73.71% return.

KKHI AM-FM DUPLICATION QUESTIONNAIRE

(Please answer with check marks (✓))

- (1) Did you listen to Radio Station KKHI anytime in the last month, in your home 1373 or away from home 1159?
- (2) If away from home, in auto 1157? At work 245? In store 65? In Restaurant 53? Other 171?
- (3) Did you listen to KKHI on an AM set 619 FM set 358 Both 945?
- (4) Would you prefer KKHI to continue as a combined operation broadcasting the same classical music selections, symphonies, concertos and other programs simultaneously on both AM and FM — so that regardless of where you are or type of radio available, you'd be able to hear the same programming? YES 1388 NO 23
- (5) Or, would you prefer KKHI-FM to do a different type of programming at least 50% of its time — such as
 - (a) "Rock and Roll Music" YES 1 NO 1139
 - (b) "Broad Popular Music" YES 26 NO 1110
 - (c) "Country and Western Music" YES 8 NO 1127
 - (d) "An all-talk format such as religion, sports, news, conversation." YES 17 NO 1118

Any other general comments?

Final tabulation submitted by:

NAME:

STREET:

CITY:

STATE:

Elmer Wayne
General Manager, KKHI

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Sample Listener Comments Taken From Questionnaire

It's such a pleasure to be able to hear Classical music programs on *both* AM & FM radio – *both* at home or "on the road". KKHI is the *only* local station that makes it possible to hear excellent programs *all day long* – of Classical Music – *such a relief* from *other* programs on local radio stations!!

Auto radio is tuned at least 80% of time to KKHI while within range. Home radio (AM-FM) is usually tuned to KKHI during evening hours until midnite.

I listen to KKHI on both AM & FM in my auto, depending on signal quality; FM is preferred but when out of range I use AM.

This is the only station I am continuously tuned to, both in car and at home! AM/car – FM/home. I drive up to 100-150 miles from San Francisco and am pleased to get fair reception even at that distance. *Suggestion:* 10-minute news at noon and 5:00 P.M.

Outstanding broadcasting as at present. *Stupid* to do otherwise!

The requirement is ridiculous.

We love you just the way you are – an oasis in the vast desert of mediocrity!

The ruling is ridiculous. We listen to KKHI at home on FM and in our car on AM. We want to hear the same music on both because we often switch from FM to AM and vice versa.

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Please continue your programming as you've been doing, otherwise I'll never listen to the radio again. Your station has given pleasurable listening to our family for several years.

I keep my FM set tuned to KKHI all the time and use another radio for news, games, etc. Often tune both sets to KKHI for stereo effect I would hate to see programming policy on KKHI changed. I enjoy having a station I can depend on for good music!

I prefer classical music at all times. There are plenty of popular music stations available. I enjoy your programming very much.

We feel that it is a wonderful thing that we are able to listen to your type of programming on both AM & FM. Many times when travelling in the car while on business it is the only programming of its kind to reach us on the car radio. It's too bad that the FCC doesn't leave well enough alone. Around our house we get up with KKHI and to sleep with you.

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The FCC proposed ruling is ridiculous — it would certainly make no sense to have a program interrupted and replaced by an entirely different program. KKHI is so superior to any other classical music station that the FCC should, instead, be more concerned with requiring other stations to program the superb music and other programs presented on KKHI.

The "different type" of programming is available on every number of the radio dial. Please keep the classical programming which you have always presented in such a pleasant and tasteful way. It is a source of much pleasure and relaxation for me, since our house rocks with the noise of three boys — all boisterous and blustery!

Your station is one of the best; I would prefer to have your type of program available at home (FM) or in the car (AM) or by portable (AM). I certainly hope there will be no change. Any limit on good music is the worst sort of brake

on an improvement in the level of broadcasting. I vote to stop the dilution of good taste over the air.

KKHI - The classic stations - was the only station my roommate could listen to when she was confined to bed during a period of sickness. If one wants to listen to any of the other above-mentioned (5) programs, there are many other stations to turn to. Keep KKHI CLASSICAL.

The reason I like KKHI is because of its good classical programming, so I would prefer hearing it on either or both AM or FM. There are enough AM stations playing popular and rock and roll music as it is. Why force a station to play other types of music when it has chosen to be a classical station? Let's not drag everyone down to the rock and roll level if he wants to listen to music of classical nature.

If you can't continue both FM & AM simultaneously, we would prefer FM classical (could abandon AM, or reduce hours of AM, play some of same programs as FM, different hours).

You are the one bright light in AM programming! I listen to you in the car coming home (AM radio) and I would hate to miss hearing the rest of the concert when I arrive and turn on FM. Stay as you are, if possible. P.S. If not possible, please remain all classical on AM.

The station KKHI is great as it now exists. It is unique in the Bay Area in its field and provides the only reliable AM station for classical music. The programming is of such quality that I usually prefer it, even on FM to the other stations available. I sincerely suspect that a bifurcation would result in an overall loss in quality and excellence.

My car radio-house radio and any portable radio - is almost entirely tuned to KKHI. Because of the fine music and programming this is the situation of many of our friends, also. We are glad to have at least one fine music station that doesn't have all this rock and roll and noise as KEWB and so many of the other stations.

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I listen to KKHI at least 12 hours a day because it is the only good music oasis on AM radio. I enjoy being able to continue listening in the car or switching to our FM in another area of our home. I've enjoyed your programming for years and hope it will not be changed!

KKHI is a godsend to people who like good music, and that station's broadcasting the same good programs on both AM and FM is procedure that ought to be continued. A change would be a calamity! We are AM listeners but all our FM listener friends join us in desiring that KKHI's program presentation remain as it is at present. We, the listening public, believe that there are enough stations broadcasting the above-mentioned "abcd" types of programs, and strongly feel that KKHI should be exempted from such programming. Thanks for your permission to express our opinion. We value your classical music offerings very highly.

KKHI should not be forced to change its excellent format. Whoever is behind this change certainly does not care for good music. The 50% stations are terrible.

KKHI is the greatest! (AM & FM). KKHI, si! FCC, non!

Thank you for fine entertainment. I have had great pleasure in the knowledge that always good music is available on KKHI. The whole idea of requiring a change in your programming seems most unreasonable. May I add that I live with a friend who has an AM set. My set is FM. It would be most unpleasant not to be able to have the same musical program at any time we are listening in our own rooms.

Let me know the name of the chairman of the FCC and I'll write direct.

KKHI-AM is an oasis in a particular arid desert of inconsequential AM programming. To divert any appreciable amount of time to the types of program listed under (5) would be a great loss, not only to the Bay Area, but also to inland areas at least as far east as Sacramento and Stock-

ton. Personally, a considerable portion of KKHI's attraction rests in identical AM & FM programming. It is a great pleasure to me to be able to work in the yard with KKHI-AM playing on a portable and KKHI-FM playing in the house. Under these conditions, I need not miss a measure of some cherished piece of music because of the inevitable trips in and out of the house. My best wishes for the success of your exemption request to the FCC.

KKHI is a haven for abused ears. I listen to it more than to all other stations combined. I hope its intelligent program planning can be preserved.

Sometimes we have FM going on a big set and AM on the small set — stereo effect. If it means anything you may quote me as saying there is enough *strong word* on the air now, and why can't they find something else to do.

* * *

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Federal Communications Commission
Washington, D.C. 20554

In Reply Re-
fer to:
8420

Buckley-Jaeger Broadcasting Corporation
of California
Radio Station KKHI-FM
340 Mason Street
San Francisco, California 94102

Gentlemen:

On November 5, 1965 the Commission granted your application (BRH-1093) for renewal of license of Station KKHI-FM at San Francisco, California.

This grant is without prejudice to whatever action the Commission may take on your pending request for waiver of the requirement of your compliance with Section 73.242 of the Rules, which provides that after October 15, 1965, no

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more than 50% of the weekly programming of your FM station may duplicate the programming of the affiliated AM station.

In the event waiver is denied, you should, within 30 days of being so informed, advise the Commission of any change in your answers to Questions 2(b) and 4(b) of Section IV of your renewal application which are adopted in order to bring your station into compliance, and submit therewith supporting program schedules.

Very truly yours,

/s/ Ben F. Waple
Secretary

typed November 5, 1965

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United States of America
Federal Communications Commission
CERTIFICATE OF RENEWAL OF LICENSE
FM Broadcast Station

File No. BRH-1093
Call Letters: K K H I - FM

Buckley-Jaeger Broadcasting
Corporation of California
Radio Station K K H I - FM
340 Mason Street
San Francisco, California, 94102

Not Valid Unless Posted With
License
File No. BLH-2696
License term ending Dec. 1,
1965

Licensee Buckley-Jaeger Broadcasting Corporation of California.

Station location: State of California
City of San Francisco

This certificate serves as a renewal of the reference
radio station license on the same conditions and in
accordance with the same provisions for the term
ending December 1, 1968.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

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Dated this 5th day of November, 1965.

[SEAL]

Federal Communications
Commission

/s/ Ben F. Waple
Secretary

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Fisher, Wayland, Duvall and Southmayd
Washington, D.C., 20004

November 30, 1965

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D.C. 20054

Dear Mr. Waple:

On February 1, 1965, Buckley-Jaeger Broadcasting Corporation of California, licensee of Stations KKHI-AM and FM in San Francisco, California, filed a request for exemption from the provisions of Section 73.242 of the rules, which provides that after December 31, 1965 (insofar as is applicable to KKHI-FM), no more than 50 per cent of the weekly programming of the FM station may duplicate the affiliated AM station. That request is still pending.

On August 20, 1965, Buckley-Jaeger filed its application for renewal of license of both KKHI-AM and KKHI-FM, the licenses expiring December 1, 1965. In connection with the KKHI-FM renewal, the applicant again expressly requested an exemption for the full license period, pursuant to Section 73.242(c). An extensive showing was made in the renewal material, demonstrating that continued 100 per cent AM-FM duplication would serve the public interest.

On November 5, the Commission granted the renewal of KKHI-FM, but included the following paragraph:

"This grant is without prejudice to whatever action the Commission may take on your pending request for waiver of the requirement of your compliance

with Section 73.242 of the Rules, which provides that after October 15, 1965, no more than 50% of the weekly programming of your FM station may duplicate the programming of the affiliated AM station."

Obviously, this grant did not comply with the requested exemption for Station KKHI-FM, which is expressly authorized by Section 73.242(c). This section provides:

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"Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of paragraph (a) of this section. Requests for such exemption must be submitted to the Commission, accompanied by supporting data, at least 6 months prior to the time the non-duplication requirement of paragraph (a) of this section is to become effective as to a particular station."

Pursuant to this provision, Buckley-Jaeger made a detailed showing. This was set forth as Exhibit 13 to the FM renewal application; it was also later supplemented by a substantial amendment filed October 20, 1965, reflecting the results of a public opinion poll on KKHI-FM's programming. As stated in Exhibit 13, based on the showing therein made:

"For this reason, we believe the Commission should grant us an exemption for the full term of our license. If the Commission is unable to agree with our exemption request, we demand a hearing to demonstrate the public interest consideration favoring continued duplication for the renewal term. We, furthermore, challenge the Commission's authority under general rule making activity, to force KKHI-FM arbitrarily to program separately 50% of our broadcasting day. . . ."

It is obvious from this specific request that the Commission's grant on November 5, of the renewal "without preju-

dice" to later action on the exemption request, constitutes a denial of the renewal application as filed.

To the extent that the Commission would isolate the exemption request and later deny it without hearing, this also would be contrary to applicant's right to a hearing under Section 309 of the Communications Act of 1934, as amended. Section 73.242(c) permits a showing that continued program duplication would better serve the public interest.

If the Commission is not convinced from the study of the application, that such a showing has been made, then Buckley-Jaeger again requests that the Commission order a hearing on the request for exemption, as permitted by Section 73.242(c). Buckley-Jaeger does not consent to having its request for exemption determined on the pleadings

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in the separately pending proceeding involving petitions by over 100 licensees for temporary exemptions.

Based on the foregoing, Buckley-Jaeger Broadcasting Corporation of California hereby requests that the Commission reconsider its partial grant of November 5, 1965 and grant the application without condition, based on the showing made therein. If the Commission is unable to grant the exemption request, then a hearing is demanded on that request, pursuant to the provisions of Sections 73.242(c) and 1.110 of the Commission's Rules.

Buckley-Jaeger Broadcasting
Corporation of California
(KKHI-AM and KKHI-FM)

Fisher, Wayland, Duvall & South-
mayd,
Its Attorneys

/s/ Ben C. Fisher

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-252
80342

In the Matter of

Requests for Exemption from
or Waiver of the Provisions of
Section 73.242 of the Commis-
sion's Rules (AM-FM Program
Duplication)

MEMORANDUM OPINION AND ORDER

* * *

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(c) Three fulltime stations are granted long-term exemptions for reasons discussed below - WHOM-FM, New York City, because of daytime coverage differences and programming of a truly unique nature (all foreign-language), and two stations in San Juan, Puerto Rico, because of the need for use of the FM signal to transmit to stations on the other side of Puerto Rico for re-broadcast during a large part of the time. See paragraph 29.

(d) In the case of 12 stations listed in paragraph 43(d), below, we grant exemption for a period of slightly over one year, or until April 1, 1967, because of the individual economic circumstances involved. If exemption is to be continued beyond that date the stations must be prepared to make a further showing (including filing their Annual Financial Reports for 1966) by February 15, 1967.

* * *

* * *

5. *Computation of time:* Section 73.242(a) prohibits duplication for "more than 50 percent of the average broadcast week." Some licensees appear to believe that this means *every* broadcast week, and therefore oppose the application of the rule to them because, taking into account great differences in nighttime AM and FM coverage, it is desirable to duplicate during nighttime hours which in the wintertime are more than half of the day. This is not the meaning of the rule, and in fact it was with this type of situation in mind that the term "average" was used. Our intention is that, over a period of a year, duplication average no more than 50%, based on the FM station's broadcast activities. At the end of a year the licensee can demonstrate compliance by showing non-duplicated programming for half or more of the total FM broadcast hours of the year—for example, 3,285 or more hours of separate programming out of the 6,570 hours which would be broadcast over an FM station operating 18 hours of a day. This annual evaluation gives the licensee flexibility to adjust the amount of duplicated and separate programming so as to reflect seasonal variations in daytime and nighttime hours, or other situations done in conjunction with an educational institution. Moreover, as we stated in the Report and Order in Docket 15084 adopting the rule (FCC 64-609, 29 F.R. 9492, 2 R.R. 2d 1658), simultaneous broadcast of special events of regional or national importance—e.g., election returns, "space shots" or presidential inaugurations—will be considered non-duplicated programming for the purpose of the rule. We also emphasize a point which may be the subject of some misunderstanding—it is the *FM station's* broadcasting hours that are the basis of determination, not those of the companion AM station.

* * *

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13. The second aspect of the rule sometimes overlooked is that the licensee retains a very high degree of flexibility as to what steps to take to comply with it. He may choose to change one station or the other (usually, it appears, the FM will be changed) to a different format during the required amount of time, or he may continue the same type of programming with different programs. WGMS, Washington, and other parties ask how the public is benefitted if the latter course is followed—for example, with one station playing the Bach *B Minor Mass* while the other is playing Beethoven's *Missa Solemnis*, or one a Bing Crosby record and the other a Frank Sinatra disc. We do not find this contention persuasive. While we hope that it will not be true (as CBS predicts) that the rule will result in nothing more than a proliferation of fare for the musically inclined, the development mentioned by WGMS would appear to be in the public interest if that is what the licensee chooses to do. We also point out that a worthwhile program need not be lost to either portion of the station's AM-FM audience (as some parties seem to believe). With modern techniques, recording and re-broadcast is a successful and very widely used form of presentation of significant programming, for example live concerts and public affairs programs where time is not of the essence. The public may well benefit from having such programming available twice.⁴

* * *

⁴In its programming showing Station KEZR, Anaheim, Cal., listed eight worthwhile public affairs programs (cultural, public issues, civic matters, etc.). It does not appear that any of these would lose significance or timeliness by a delayed broadcast.

* * *

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* * *

18. *Programming.* Many petitioners stress the character of their program service, described as of high quality, val-

ued by listeners, and, often, "unique", so that it should be available to listeners at all times on whichever service they choose to receive it. This contention is put in many different contexts—good music or classical music, light classical, the only "top 40" station in the market, balanced programming, the programming of a particular network, all-news, "informational" programming (news, discussion, interviews, "hot line" programs, etc.), foreign-language, high popularity in the market, and numerous others.

19. We do not here grant any exemptions on programming grounds alone. To do so would require a searching inquiry into and evaluation of the character, merit, popularity, and "uniqueness" of the station's programming—a task we believe difficult and perhaps impossible, and in any event undesirable. It would be difficult, if not impossible, to arrive at any significant standards on which to base such a decision, since every station differs to some degree from every other station. Moreover, as mentioned before, the rule requires only 50% non-duplication—thus permitting the simultaneous presentation of a large amount of programming if the broadcaster deems it particularly significant to the audience or the station—and the broadcaster retains complete flexibility in his approach to the non-duplication requirement. If he wishes, he may present on both stations programming of substantially the same character such as classical music, or he may change the format of one to something of a different type. However, we do take into account highly distinctive programming where it is present along with other factors, as indicated above.

20. In this connection, we note a common argument that because of the large number of aural program sources available in many of these cities, non-duplication will serve no purpose, since the non-duplicating programming will merely be a copy of what another station in the market is already doing. Columbia Broadcasting System, Inc. (CBS), seeking exemption for all seven of its FM stations (which duplicate completely or nearly so), asserts that the number of such sources in its seven cities is as follows (AM and

FM, less duplicating operations): New York, 56; Los Angeles, 47; Chicago, 51; Philadelphia, 33; Boston, 30; San Francisco-Oakland, 31; and St. Louis, 22. We do not find this contention persuasive. Considering the imagination and inventiveness that broadcasters have displayed, we do not conceive that the presence of numerous existing aural program sources means that nothing different

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can be added, to the benefit of the listening audience. See paragraph 13 above.

* * *

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* * *

22. In a few cases below we take individual economic circumstances into account in granting temporary exemptions. Otherwise, we do not find sufficient merit in these contentions, most of which were advanced before and considered in connection with our adoption of the rule. Bearing in mind the ingenuity and imagination of broadcasters, the fact that only 50% non-duplication is required, and the high degree of flexibility which the broadcaster has in meeting the non-duplication requirement, we do not conceive that non-duplication will result in mere repetition of the program fare already available or loss of diversity in the FM band. The economic arguments advanced we do not accept, because in our view they assume a continuation of present rather small total FM revenues "—an assumption we believe is contrary both to the experience of the past several years during which FM revenues have been increasing, and to what is likely to happen in the future, as set sales increase and the medium develops its separate existence and appeal (to audience and advertisers) to an increasing degree. We do not foresee that the unavailability of the exact same program on both media at the same time (e.g., an "informational" program) will retard the continued and more rapid growth of FM. Rather, in our view, purchase

of FM sets may be spurred by the greater number of program choices available. We also think it reasonably likely that—with FM established in the large cities as at least a partially separate medium—advertiser interest in the medium should grow.

* * *

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32. Some licensees urge that, aside from coverage and reception problems discussed above, there is no AM-FM "duplication" in any significant sense because the uses of the two media are largely different—FM is listened to in the home (often at one elaborate installation), and AM is used by persons carrying transistors, in the yard, on the beach, and elsewhere—and, particularly, in autos (FM automobile radios, while increasing, are still small in number). It is also urged that there is no significant "duplication", even where the intelligence being broadcast is the same, because FM's greater fidelity makes it really a different service; and that this is especially true where the FM station broadcasts in stereo and stereo stations should be given a blanket exemption. We do not agree with these contentions. We do not conceive that any such differences are meaningful as far as the waste involved in duplicated programming is concerned, as mentioned above in connection with coverage differences. A number of licensees urge that their programming should be available to the audience on whichever medium it chooses to receive it at a particular time (citing the different listening situations just mentioned) and, in particular, that "continuity" of listening should be possible, for example during "drive time" a person listening to a sporting event or good-music selection on his car radio should be able to continue listening at home on FM—or, in the morning, vice versa. We do not regard this as a significant consideration in relation to the inefficiency and waste involved in duplication; insofar as "drive time" hours are concerned the licensee may continue to duplicate these hours if he so chooses. In any event, these are general con-

siderations going to the merits of the rule itself, and we would not be justified in granting the large number of exemptions which would be required were these arguments accepted. Another contention is that the station's AM programming should be presented on FM in its entirety because it is "suitable" for FM—good music, popular music but not rock-and-roll, etc. (in a few instances, petitioners assert that their decision to duplicate in recent years, or to quit separate programming, was based on the fact that the musical character of their AM format was being changed to something more suitable to FM.) This contention misses the point—that regardless of the character of the programming, duplication is a wasteful and inefficient process.

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37. Of equal, or perhaps greater, significance from the present standpoint is the continuing increase in FM revenues—representing separate FM programming—obtained by FM stations operated by AM licensees, resulting from both more FM stations doing separate programming and more revenue per station. The number of FM stations in combined operations engaging in separate programming to some extent has increased sharply in recent years, from 284 in 1961 to 521 in 1964, a trend we noted in the Report and Order adopting the rule. For 1962, 1963 and 1964 the number of such stations, the total revenues received by them, and the average revenue per station, are as follows:

No. Stations	Revenue received		Rev. per sta.
	(mil.)	(thou.)	
1962 408	\$4.6		\$11.3
1963 405	\$4.9		\$12.1
1964 521	\$6.9		\$13.2

The 1963-1964 increase was 40%, in total revenue received by these stations. These figures are perhaps more significant than the "loss" figures for the independents, because—

with the inevitable overhead involved in operating a station spread over a combined AM-FM operation—a given amount of FM revenue which would leave an independent FM station showing a loss might well mean at least a break-even FM operation for an AM-FM facility.

38. We also note what appears to be a fairly high degree of set saturation in large cities. According to a survey conducted by The Pulse, Inc. for the National Association of FM Broadcasters in 1963-1964, FM set saturation (percent of radio homes) in ten large cities was as follows: New York, 51.3%; Detroit, 37.7%; Los Angeles, 45.3%; San Francisco, 41.8%; Philadelphia, 35.2%; Boston, 38.2%; Cleveland, 34.8%; Chicago, 44.7%; Pittsburgh, 31.1%; Washington, 36.6%. FM set sales have also shown a continuing increase. According to E.I.A. data, the number manufactured increased from 905,000 in 1960 to 2,391,000 in 1964, with a projection for 1965 of more than 3,000,000. *Television Digest* estimates that 7,570,000 sets able to receive FM will be sold in the U. S. this year, compared to 6,000,000 in 1964 and 5,050,000 in 1963. The percentage of sets able to receive FM as compared to AM-only receivers is likewise increasing, as is the number of FM auto radios (though the latter is still only a small percentage of total car receivers). In the trade press and by the NAFMB, this FM growth is attributed to our actions looking toward non-duplication.

* * *

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43. In view of the foregoing, and for reasons stated in the Appendix hereto, IT IS ORDERED, That, the provisions of Section 73.242(a) of the Commission's Rules ARE EFFECTIVE on the dates set forth in the following subparagraphs, as to the stations listed in each subparagraph (stations are listed alphabetically by state and city).

* * *

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* * *

(d) *April 1, 1967:*

<i>Station</i>	<i>Location</i>	<i>Station</i>	<i>Location</i>
KPAT-FM	Berkeley, Cal.	KBEY	Kansas City, Mo.
KKHI-FM	San Francisco, Cal.	KDEF-FM	Albuquerque, N.M.
WDAE-FM	Tampa, Fla.	WEVD-FM	New York, N.Y.
WNUS-FM	Chicago, Ill.	KPOJ-FM	Portland, Ore.
KRMD-FM	Shreveport, La.	KTNT-FM	Tacoma, Wash.
WCOP-FM	Boston, Mass.	WRIT-FM	Milwaukee, Wis.

* * *

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* * *

District of Columbia: *WGMS-FM.* (1) Unique programming (the area's only full-time AM-FM classical music operation, with considerable live music), with desirability of "continuity" of listening (see paragraph 32); (2) if compliance means the same format with different selections it is meaningless (see paragraph 13) or, if different formats, either the higher quality of FM would be lost to good music reception or the AM station would be changed to a copy of some existing station; (3) loss of the present attractive FM programming would hurt FM development; (4) coverage differences, chiefly nighttime. Denied, for reasons stated in paragraphs 12-13, 16, 19-22, 32.

* * *

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New York City

WHOM-FM: (1) Unique programming, all foreign-language (Spanish except on Sundays, then German and Italian), said

to serve the needs of the growing Spanish-speaking population which is tending to move out of the center of New York into areas the AM station cannot reach, and which includes considerable programming of a public-service nature aimed at this audience; (2) Coverage differences both day and night (daytime, 3,559,700 persons are served by FM but not by AM; the licensee estimates that 125,000 to 150,000 Spanish-speaking persons reside beyond its AM contours, and numerous letters from Spanish-speaking listeners in places such as Glen Cove, L.I., Newark and Trenton were submitted); (3) Past experience with FM; a separate good-music operation in 1961-1962 was unsuccessful, and, after consultation with community authorities the change to duplicated Spanish-language programming was made, in view of the movement of this population to suburban areas as mentioned above. *Exemption granted until December 31, 1967*, in view of the unique programming and reliance on it by listeners (apparently daytime as well as nighttime), and coverage differences.

* * *

WQXR-FM. (1) Unique and high-quality programming (one of the nation's oldest good-music operations, with 85% music (60% classical, 25% other), and an extensive news operation); (2) This programming has helped acceptance of FM in the area; (3) A separate FM operation would add nothing to the multiple program choices available and would make WQXR-FM just another FM station, with programming which cannot be better than that now presented and might well be inferior; (4) the indivisibility of its audience and the "continuity" arguments mentioned previously; (5) in order to produce high-quality programming WQXR's expenses are high and profit relatively low (\$41,000 in 1964), and increased FM separate programming costs would hurt its quality generally; (6) it would have to cut rates because it would lose that portion of its audience which now receives it on FM; (7) AM reception problems. *Denied*, for reasons stated in paragraphs 12-13, 19-22, 32, and 36-39.

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[Received - Jan. 27, 1967]
[FCC - Office of the Secretary]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

**BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA
(KKHI-FM)**

File No. BR-1093

Renewal of License

To: The Commission

**REQUEST FOR EXEMPTION PURSUANT TO
SECTION 73.242(c), AND ALTERNATIVE
REQUEST FOR HEARING**

* * *

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* * *

In addition to this evidence supporting the grant of the exemption for the balance of the renewal term is a survey conducted in May of 1966, dated July, 1966, and entitled "Profile of a KKHI Listener." A copy is attached as Appendix A. In summary, this survey shows that the KKHI classical music listeners are predominantly adult (69% are over 21); they are well-educated (72% of the male heads have a degree; 91% have some college education); a high percentage of the listeners are professionals (4 out of every 10); they are above average income families (75% have an income of over \$10,000). Their affluence and education is reflected from the fact that over two-thirds own their own homes, 61% own stock; they are well traveled and they regularly attend concerts, operas, recitals or movies.

Their listening habits show that 88% listen to KKHI in their homes and 77% listen in autos. They use both AM

and FM radios interchangeably and extensively. 88% listen on AM only or on both AM and FM. 67% listen on FM only or both AM and FM. 55% listen on both AM and FM.

It was this audience—namely, the educated, adult, affluent listeners—whom KKHI determined to sample this past December to determine their preferences regarding the Commission's AM-FM non-duplication rule and specifically their

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preferences regarding continued duplication on KKHI-AM and KKHI-FM. A mailing list of some 2,000 names selected at random were made up from listeners' mail received at KKHI during the month of November, 1966. To this mailing list was sent a letter and a questionnaire (attached here-to as Attachment B).

* * *

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It was the original licensee judgment of Buckley-Jaeger that it should present to the Bay area on both AM and FM the absolute highest quality classical music programming and that this should be carried on a full-time basis day and night over both KKHI-AM and KKHI-FM. The San Francisco Bay area is recognized as an important cultural market. Among the citizens of the area there is a demand for this type of unique programming offered on a full-time basis. Only these two stations serve this special audience on a full-time basis. This audience is not divisible; that is to say, some of the audience will use the services of KKHI-FM at home with high fidelity receivers; these same persons or others when on the beach will use a small AM portable; still others when driving will use an AM or FM car radio.

Obviously, to those individuals the classical programming offering is what counts and not the particular frequency. It is in order to service this highly exclusive and mobile audience that Buckley-Jaeger uses both the AM and the FM bands simultaneously. Judging from the comments filed by this audience, they would be outraged were KKHI-AM

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or FM to resort to a totally different format and a different type of programming.

* * *

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* * *

Buckley-Jaeger states that upon hearing it would be able to introduce the testimony of its listening audience and of prominent representatives of civic, fraternal, educational and other public service groups in the Bay area in support of its position. Buckley-Jaeger will be able to prove through disinterested public witnesses that the public interest would be served by continued AM-FM duplication. For this reason, a hearing is respectfully requested if the Commission is unable to make the public interest determination on the pleadings as filed.

Respectfully submitted,

BUCKLEY-JAEGER BROAD-
CASTING CORPORATION
OF CALIFORNIA
(KKHI-FM)

By Ben C. Fisher, Its Attorney

Fisher, Wayland, Duvall
and Southmayd
703 Perpetual Building
Washington, D. C. 20004

January 25, 1967.

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KKHI

December 7, 1966

1550 am/fm 95.7

The Classic Stations

TOTAL RETURNS - ATTACHED

Dear Listener:

The Federal Communications Commission in Washington, which licenses radio stations, has ruled that stations KKHI AM and KKHI FM Stereo currently broadcasting the same programs on both AM and FM must soon begin presenting different programs at least 50% of the KKHI FM broadcast day. For KKHI AM and FM this becomes effective April 1, 1967, but we are requesting an exemption from this FCC ruling.

KKHI AM and KKHI FM Stereo are the only combined *full-time* classical music stations in the Bay Area and Northern California, currently broadcasting the same programs on both AM and FM stations. We believe we can best serve and satisfy your classical music desires and needs by continuing, without any change, to broadcast the same programs on KKHI AM and KKHI FM Stereo.

Therefore, if our exemption request is granted, and that's why we are seeking your opinion and support, you would still have the opportunity of listening to KKHA's "Music of the Classics" on either KKHI AM or KKHI FM—no matter where you were located, in your home or your auto, or what type radio set you were using at the time, wherever you are.

Since it is our obligation to program KKHI AM and KKHI FM Stereo as you, one of our listeners wishes, won't you please fill out the attached brief questionnaire and return it to us immediately in the enclosed self-addressed stamped envelope? We are looking forward to hearing from you. Thank you for your help and support.

Sincerely,
Elmer O. Wayne
Vice President and
General Manager

***KKHI AM and KKHI FM STEREO
DUPLICATION QUESTIONNAIRE***

(Please answer with check marks ()

- (1) If you listened to Radio Stations KKHI AM or KKHI FM anytime in the last month, was it *only* in your home 273 or *only* away from home 93? *Both* 1,037
- (2) If away from home, in auto 1,067? at work 214? in store 59? in restaurant 33? other 107?
- (3) Do you listen *only* to KKHI-AM 386? *only* KKHI-FM 117? Or Both 895?
- (4) Would you prefer KKHI to continue as a combined operation broadcasting the same classical music selections, symphonies, concertos, and other programs *simultaneously* on both KKHI AM and KKHI FM—so that you would receive the same programming regardless of whether you were listening on your AM or FM radio?

YES 1302 NO 53

- (5) Or, would you prefer KKHI FM to do a different type of programming at least 50% of its time—such as:
 - (a) "Rock and Roll Music" YES 11 NO 956
 - (b) "Show Tunes - Albums - Background" YES 110 NO 826
 - (c) "Classical - Different programs on KKHI FM dial from KKHI AM." YES 178 NO 694
 - (d) "Country and Western Music" YES 11 NO 933
 - (e) "An all-talk, such as telephone interview, sports, news, conversation, religion." YES 27 NO 933

Any other general comments?

976 *with comments*
433 *no comments*
1,409 *total returns - 70%*

NAME:

STREET:

CITY, STATE:

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KKHI AM and KKHI FM STEREO DUPLICATION QUESTIONNAIRE

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"I move from house and/or office to my car numerous times each day. The car only has AM, the home Hi Fi only has FM, so the *simultaneous* programming on the AM and FM is important to me."

Helen Matheson
2307 Haste Street
Berkeley, California, 94704

"I feel that simultaneous broadcast is a great service to those listeners who cannot always listen at home on their FM. I also believe that such a ruling, as it opposes the standards of the station management and the listeners, as well as standards of convenience and good taste, is not in the public interest."

William P. Johnson
2947 Piedmont
Berkeley, Calif. 94705

"It seems to me that the FCC is attempting an intolerable amount of regimentation. I cannot bear to think that I may lose the classical programs from the *only* radio station I can reach that provides them. Television has never given us enough symphony music to make up for the ones that are already lost to radio—Standard Symphony, Ford Symphony, etc. I would buy an FM radio, but they tell me

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it would not reach to San Francisco from Medford. I feel so fortunate to get your programs on AM."

Mrs. T. V. Williams
1975 Houston Road
Medford, Oregon 97501

"The Greater Bay Area needs a classical station. FM in moving vehicles is not perfected, thus although we have AM-FM car radio, AM is superior. Of course at home, the sound of KKHI Stereo is a greater treat. Stick to your aims."

Arnold F. Kohnert
426 LaJolle Avenue
San Mateo, California

"We love you just the way you are. When so *many* other stations broadcast all that other nonsense, there is much need for *you* to do just the type of programming you do. WE NEED you! Tell them to PLEASE leave you alone. No justification for any change."

Mr. & Mrs. Warren Swing
40 Norlyn Drive
Walnut Creek, California

"Don't ever change KKHI. It is the only station we can turn to and always get good music without a lot of yakking. We don't even bother to tune in other stations anymore—our radio is always set to come on at KKHI. The advertising is pretty much soft-sell too, not frantic. Don't change."

Mrs. Leinani Mussells
12570 Brookpart Road
Oakland, California 94619

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"I like things the way they are ! I listen to KKHI-AM *constantly*. My radios at home, work, and in the car, are set on KKHI all the time. Why can't the FCC get off our backs !"

Armand L. Mauss
11 Garron Court
Walnut Creek, Calif. 94596

"I believe the current FCC proposal against duplicate broadcasting on AM and FM is properly aimed against "Trash AM Stations" KCBS, KNBR, KGO, KYA, etc. which repeat their 3 minutes of noise—2 minutes of commercials on both AM and FM. This needlessly clutters up the FM band which has a legitimate function to provide quality programming. If this rule results in limiting KKHI's ability to provide quality programs on AM particularly for the driver listener, it would be a shame."

Mr. & Mrs. Frank J. Berto
90 Van Tassel Ct.
San Anselmo, California

"We like KKHI just like it is, to change it in *any* way would lose many listeners for you."

Mr. & Mrs. J. Korver
176 Alta Vista Lane
Los Altos, California

"I listen regularly and almost exclusively to KKHI—KKHI AM daily while commuting between San Mateo and Oakland, and KKHI FM, when I listen to the radio at home. I find this an excellent arrangement and enjoy the classic music which you broadcast very much. I trust FCC will grant your request."

Maurice F. Powers
105 W. Bellevue Avenue
San Mateo, California

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"Continue as it—However, I work and turn on KKHI FM when I wake up until 8, go to work—and then turn it on again about 6:30 pm, so of course, would like it to continue as is."

Jeanette Sperry
1242 Vallejo Street
San Francisco, California

"I enjoy the programming as presently set up. Any possible alternative for the FM station would (or should) be a different classical program, but that seems like a lot of unnecessary work. Hopefully you will be exempt from this somewhat ridiculous ruling."

Christie Redford
850 Coleman No. 9
Menlo Park, California

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"Since we own both AM and FM radios, we like to be able to get a decent program when we have the time to listen to the radio. Certainly, enough stations already operate in this area with "trash" programs; I see no reason why the FCC should pry into the business of a station which is producing good music for those of us who wish to listen to some quality in music. I am a little weary of all this government meddling in everything we do and have. If this is why we have to pay so much tax? I fail to see the value of such interference."

Margaret O'Neal Casey
18602 Center Street
Castro Valley, California

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"Whatever the basis of the FCC ruling, it seems to me that it is inappropriately applicable to a station of the quality of KKHI."

G. D. Dorougl
314 Glendora Circle
Danville, California

"Since my tastes in music usually prefer classical music, I would be very unhappy if KKHI AM and KKHI FM were to change their programming. As a regular routine, I leave my FM set to turn on the car radio to the same program on AM."

C. Herbert Wennerberg
1932 Yosemite Road
Berkeley, California 94707

"I believe that as a free enterprise function, your company should be able to continue operations in the manner which your management feels will best suit your listeners, and most appeal to your advertisers and sponsors. Best of luck!"

Michael J. St. Clair
15 Roan Place
Woodside, California 94062

"In today's busy life I find it very convenient to be able to listen to a complete symphonic work even though I may have to change locations a couple of times while doing so."

Peter Mansfield
Box 3862
Stanford, California 94305

"Since there are so few stations broadcasting the classics it is a pleasure to listen almost exclusively to station KKHI whether AM or FM happens to be available."

A. J. Sherman
1780 Piedmont Drive
Concord, California 94520

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Before the FCC 67-509
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554 98514

In the Matter of

Requests for Exemption from
or Waiver of the Provisions
of Section 73.242 of the
Commission's Rules (AM-FM
program duplication)

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1967; Released: April 27, 1967
By the Commission: Commissioner Lee absent; Commissioner
Cox dissenting to action on KBEY and KPOJ-FM.

1. The Commission has before it for consideration various requests for further exemption from the provisions of Section 73.242(a) of its Rules, which limits to 50% of the average broadcast week the amount of time FM stations in cities of 100,000 or more may devote to duplicating the programs of commonly owned stations in the same local area. This Memorandum Opinion and Order deals with eight requests for longer periods, filed by: (1) two stations in San Juan, Puerto Rico, given exemption until February 1, 1967 by our action of March 1966, and later until May 1, 1967 by staff under delegated authority; and (2) six stations which in our March 1966 action were given an exemption until April 1, 1967, because of the economic circumstances of their individual situations. These also have been given exemption until May 1. Also covered is a temporary request by Station KIXI-FM, Seattle.

2. *Stations in San Juan, Puerto Rico.* Stations WKAQ-FM and WFQM, San Juan, were given an exemption until the end of their then current license period, February 1, 1967, because of the need for use of the FM signal to

transmit programs for re-broadcast by commonly owned stations on the other side of the island during a substantial part of the broadcast day. This reason no longer obtains, since the stations have constructed and put into operation a joint microwave relay system for this purpose. Further exemption is requested: (1) by WKAQ-FM, until December 31, 1967, to complete construction of a new studio building, which was begun promptly early in 1966 but will not be completed until this coming October (exemption until the end of the year is asked to be on the safe side); (2) by WFQM, because of the pendency of a revocation proceeding against it (Docket 15140). It is urged that if required to comply WFQM would need to incur substantial expenses, both in improvement of facilities (which probably the Commission would not permit while the proceeding is pending) and cost of operation, and it wishes to maintain the *status quo* while the continued existence of the station's license is uncertain. Exemption until six months after a decision in Docket 15140 is requested.

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3. It appears that in both cases good cause for exemption is shown. In the case of WKAQ-FM, we are granting exemption for about six months, or until November 1, 1967; further exemption if necessary (up to three months) may be granted under delegated authority. As to WFQM, exemption is granted until three months after decision in Docket 15140; additional time, if the decision is in the licensee's favor and more time is needed, can be granted by delegation. This exemption is without prejudice to whatever decision may be reached in that proceeding, and it not a finding that continued operation of WFQM is or would be in the public interest.

4. *Station KKHI, San Francisco.* Station KKHI-FM, San Francisco, was granted an exemption in our March 1966 action because of its particular economic circumstances. However, this was not the main ground on which exemption had

been sought, which is discussed below, and KKHI has not submitted the 1966 economic showing which we stated at that time (FCC 66-242, par. 3(d)) would be required by February 15 if exemption on this basis is to be continued (see 2 FCC 2d 833, 835). Rather, other grounds are urged.

5. KKHI filed its exemption request in February 1964, based on various arguments and emphasizing its desired and allegedly unique classical music programming. In August 1965 it filed its renewal application containing a similar showing and requesting exemption, and by letter of October 20, 1965, it submitted a further showing in this respect as an amendment to the renewal application. Renewal was granted on November 5, 1965, "without prejudice to whatever action the Commission may take on your pending request for waiver" of the 50% non-duplication rule. By letter of November 30, 1965, KKHI objected to the grant on this basis, claiming that it amounted to a denial of the renewal application as filed. It claimed that isolation of the exemption request, and later denial without hearing, would deprive it of its right to a hearing provided by Section 309 of the Communications Act, terming the grant made as "partial, it demanded a hearing under Section 1.110¹ of the Commission's Rules, concerning "partial grants". In our March 1966 Memorandum Opinion and Order (par. 3(d) and 43(d)) and the Appendix thereto (par. 4) we granted exemption to KKHI and 11 other stations until April 1, 1967, on the basis of the

¹Section 1.110 reads as follows:

Partial grants; rejection and designation for hearing. Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is spec-

ified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.

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individual economic circumstances of each case. It was specifically stated that the other contentions urged by these parties were not being ruled on. See 2 FCC 2d 852. In the pleading now under consideration (filed January 27, 1967) KKHI again urges that it is entitled to exemption for its current license period (to December 1, 1968) on the basis of the showings made, reasserts its right to a hearing under Section 1.110, and alleges that the Commission has no authority to impose a judgment as to the manner in which a broadcaster may program its joint AM-FM operation.

6. Station KKHI-FM in each pleading relies on audience surveys which it urges support the licensee's judgment that KKHI-FM's classical music programming is "unique" and highly desirable to its "indivisible" audience, with the ultimate conclusion that the public interest would be served by an exemption for the entire license period. The surveys were conducted in May and September 1964, September 1965, and May and December 1966. The earlier surveys were generally similar, both in form and response, to the December 1966 survey, which involved a questionnaire sent to 2,000 listeners picked at random from station mail received in November. Some 1,400 replies were received; 895 respondents reported listening to both the AM and FM station rather than one exclusively; over 1,000 listened both at home and away from home; 1,302 answered "yes" to a question as to whether they would prefer simultaneous programming so they could receive it whether listening to AM or FM (compared to 53 "no" answers); all but minute percentages said they would not prefer the FM station to present other types of programs at least 50% of the time (rock and roll, show tunes, country and western, all-talk); 694

compared to 178 would not prefer the FM station to present classical but different programs 50% of the time. 976 listeners added comments; of about 85 submitted with the last pleading all praised KKHI's music, a number said it was unique and several mentioned the desirability of being able to get the programs on both AM and FM.² KKHI submits data as to the makeup of the respondents, describing its audience as "educated, adult, affluent".

7. Aside from the legal arguments concerning its "partial grant" rights which are discussed below, KKHI makes arguments generally similar to those considered in our March 1966 Memorandum Opinion and Order (2 FCC 2d 833) and December 1966 decision on reconsideration of denial of certain requests (3 FCC 2d 167, FCC 66-1194, adopted December 21, 1966). These include the quality and alleged uniqueness of its programming, its desirability to its audience (as the surveys show) and the need for "continuity" of FM-AM listening by that audience (which is not "divisible"); the highly numerous and diverse number of aural services available, so that separate programming would add nothing; presentation of extensive live music (San Francisco and Oakland Symphonies and other groups); extensive costs (estimated \$23,000 for added studio space, and \$67,000 or more a year for additional staff) adverse economic

²KKHI's letter sent with the questionnaire urged listeners to support continued duplication so they could continue to get "Music of the Classics" no matter where they are, at home or in a car, or what kind of set they are using.

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effects of increasing the number of competing stations (both in this market and generally); that the rule is an unwarranted and illegal intrusion on the licensee's programming judgment (at least here, where the stations are programmed in light of overwhelming audience response), and others.³

8. Therefore, KKHI requests exemption for the remainder of its license terms. Alternatively, it insists on a right, under Section 1.110 quoted above, to reject its renewal grant without grant of the exemption—which it states that it does—and to an evidentiary hearing on the question of whether continued duplication would serve the public interest. It states that it can prove the latter through testimony of listeners and representatives of prominent civic, educational and other groups.

9. As to the merits of the exemption request, we have carefully considered the facts and arguments presented and conclude that exemption is not warranted. The reasons for our decision have been set forth at length previously in the documents cited above, and need not be elaborated here. We have mentioned the waste involved in using two broadcast frequencies to bring exactly the same intelligence to the same receiver locations;⁴ and our judgment that, in large markets where FM set circulation is now relatively high, the time has come to require the FM medium to operate to this degree as a separate service and end the waste. As we have pointed out, the licensee has a high degree of latitude in complying with the rule, presenting similar though different programs and selections or adopting a different format, duplicating 50% of the time when it appears to be significant to do so (for example, perhaps, during “drive time”), and using delayed-broadcast techniques for significant programs. As we pointed out in considering the request for reconsideration filed by WTOP, Washington, D.C., the audience may well benefit from having significant musical and other programs available twice, once on AM and once on FM. Listener choice is increased. We have rejected the general economic arguments advanced (see March 1966 Memorandum Opinion and Order, pars. 33-39, 2 FCC 2d 846-849); the AM-FM financial data released since that decision (FCC No. 90562, October 1966) shows an improving FM picture. We recognize what appears to be the high quality of KKHI's musical programming and that it is liked by its listeners, but there appears no reason why it cannot continue to be avail-

able on both services when the stations comply with the rule. We point out that our action here is similar to that taken with respect to other

³ KKHI's general arguments are similar to those noted in the March 1966 decision for Station WDR, Hartford (essentially the same licensee). See 2 FCC 2d 854-855.

⁴ Unlike many petitioners for exemption, KKHI does not make a substantial claim of coverage differences. As to the argument as to "continuity" of listening, this was considered and rejected in the March 1966 Memorandum Opinion and Order; see paragraph 32, 2 FCC 2d 845-846.

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"good music" operations, such as WGMS, Washington, and WQXR, New York City.⁵

10. Nor do we find merit in the contention that KKHI—by "rejecting" grant of its renewal application without grant of exemption and invoking Section 1.110—is entitled to an evidentiary hearing on the question of whether continued duplication would serve the public interest. This amounts to a contention that a licensee, by requesting waiver of *any* Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance. As we have repeatedly said, not every request for waiver warrants a hearing. The rule here requires a certain amount of non-duplication unless we conclude that a substantial showing is made that the public interest would be better served by duplication entirely or to a greater extent. KKHI made a showing in this regard prior to its renewal application, and repeated the showing when it filed the latter. It was not necessary to consider its request in connection with renewal, nor, in view of the particular economic circumstances then obtaining, was it necessary to consider it shortly thereafter in connection with the other exemption requests, since an

exemption for the economic reason was warranted. KKHI has chosen not to make an economic claim for further exemption. We have now, therefore, carefully examined its showings in the other respects—made at several times, as noted above—and find that they do not constitute the “substantial showing” specified in Section 73.242(c). A hearing is neither required nor appropriate. KKHI’s request for continued exemption, or alternatively, for a hearing on its request, is denied. We are herein giving three months—or til August 1—for the station to come into compliance; additional time if necessary may be granted by staff action.

11. *WEVD-FM, New York City.* Like KKHI, WEVD-FM, New York City, received an exemption on individual economic grounds, but now urges largely other arguments, including programming (the only station presenting a substantial amount of programming in Yiddish and a number of other foreign languages), the licensee’s basic cultural purposes and coverage differences, the FM outserving the AM both day and night. It also calls attention to another aspect of its operation: WEVD(AM) is a share-time station, sharing time on the frequency with two other stations, and thus cannot operate during substantial portions of most days of the week, (late afternoon and early evening). The FM station operates during these hours, which total 21 weekly (the joint operation is 101 hours). Exemption is therefore claimed on the same principle as that applied to daytime-only and limited-time stations in the March 1966 Memorandum Opinion and Order (paragraphs 24 and 25, 2 FCC 2d 842-843).

⁵ We note KKHI’s assertions as to the “uniqueness of its programming, and assume it is of distinctive character. However, one other San Francisco station which petitioned for exemption (and received it because the associated AM station is daytime-only), KDFC, advanced a classical format as one reason for its claim. There are other good-music stations in San Francisco. This illustrates the problem with granting exemption on the ground of “unique” programming; see 2 FCC 2d 840.

12. It may be that exemption would be appropriate aside from the latter fact, on the same combination of unique programming and substantial daytime and nighttime coverage differences that were found to justify exemption for Station WHOM, New York City (see 2 FCC 2d 840, 858-859). When the matter of limited AM hours, and thus substantial separate FM operation, is taken into account, we find that exemption is warranted. However, exemption is granted only on condition that the FM station operate during those hours when the AM station is not operating (except between midnight and sign-on in the morning).

13. *KTNT-FM (Tacoma, Wash.), KBEY (Kansas City, Mo.), KPOJ-FM (Portland, Ore.), and WNUS-FM (Chicago, Ill.).* These four stations also request a continuation of their exemption because of particular economic circumstances. Review of their showings indicates that further exemption is warranted. It is granted on the same basis as before, until April 1, 1968, and will be extended only if the stations file their annual financial reports (FCC Form 324) for 1967 by February 15, 1968, and review thereof indicates that further exemption is appropriate.

14. *KIXI-FM, Seattle.* This station, whose long-term exemption request was denied in the March 1966 action, (see 2 FCC 2d 863), again requested a long extension and last December it was given an extension until April 1, 1967. It has requested an additional three months, until July 1, 1967, which was granted by the Chief, Broadcast Bureau, under delegated authority. Its request is based largely on the great differences in coverage between its 1-kw directional AM operation and its FM station (79 kw E.R.P.). It asks exemption, essentially, until it can file for and obtain an increase in AM facilities to reduce these differences; earlier applications for KIXI(AM) have had to be returned because they did not meet the protection requirements of the Rules (the last was returned March 3, 1967). In support of its request it urges these differences—its FM signal reaching large

populations unable to receive the AM station—⁶ and its valuable service, shown by rating reports indicating it to be among the top stations in the area with a very substantial proportion of its listening being FM.

15. The basic facts and contentions involved here have been considered before and rejected. We see no reason to change our decision. Compliance by August 1 should be feasible and it is so ordered.

⁶Population within the FM 1 mv/m contour, 1,580,636; within the AM 0.5 contour (and receiving primary AM service) 965,103; within the AM 2 mv/m contour, 890,805.

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16. In view of the foregoing, IT IS ORDERED, That exemption from the provisions of Section 73.242 of the Commission's Rules IS GRANTED, to the stations listed below, to the date indicated.

(a) August 1, 1967	KKHI-FM, San Francisco, California KIXI-FM, Seattle, Washington
(b) November 1, 1967	WKAQ-FM, San Juan, Puerto Rico
(c) April 1, 1968	KTNT-FM, Tacoma, Washington WNUS-FM, Chicago, Illinois KBEY, Kansas City, Missouri KPOJ-FM, Portland, Oregon
(d) June 1, 1969	WEVD-FM, New York, New York
(e) 90 days after the effective date specified in the final Commission decision in Docket 15140, unless such final decision specifies an earlier date for termination of the station's operation: WFQM, San Juan, Puerto Rico.	

17. IT IS FURTHER ORDERED, That, the requests filed by the stations listed above, for further exemption from the provisions of Section 73.242(a) of the Commission's Rules,

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ARE GRANTED, to the extent indicated in paragraph 16,
and in all other respects ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

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April 27, 1967

8600

Air Mail

Radio Station KKHI-FM
Buckley-Jaeger Broadcasting Corporation
of California
340 Mason Street
San Francisco, California

Dear Sirs:

This is with reference to your request for further exemption from Section 73.242(a) of the Commission's Rules, the "AM-FM non-duplication" rule.

The Commission has considered your request, and concluded that further exemption beyond a short period is not warranted. Accordingly, the rule becomes effective as to Station KKHI-FM on August 1, 1967.

Very truly yours,

Ben F. Waple
Secretary

JHB:lks/r&s:B

cc: Ben C. Fisher, Esquire
c/o Fisher, Wayland, Duvall and Southmayd
703 Perpetual Building
1111 E Street, N. W.
Washington, D.C. 20004

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Exhibit No. 10

KKHI - DISCUSSION OF CONTROVERSIAL ISSUES

The station's policy with respect to time for discussion of controversial issues is based on our recognized obligation as broadcasters to inform and enlighten American public opinion - with particular emphasis on the local area we serve. We will provide time for discussion of controversial issues and subjects consistent with a recognition of the public interest, convenience and necessity.

Well-known and highly reputed community leaders, civic personalities, government officials, religious leaders and educators will be invited to present various viewpoints on controversial topics so that all facts and opinions expressed may be fully evaluated by the listener. Both sides of controversial matters will be fairly presented.

Descriptions of regularly scheduled weekly KKHI "Discussion" programs, topics and guests follow:

KKHI GUEST BOOK

This series is presented on Thursdays from 11:30 to 11:55 A.M. The program consists mainly of interview and/or discussion material, with some music - roughly 2/3rds of the time is devoted to discussion. The interviews vary in length but run up to 18 or 19 minutes.

Here are some examples of interviews with prominent persons in the field of classical music:

Boris Goldofsky (opera)	March 11, 1965
David Sheinfeld (composer)	April 22, 1965
Anna Moffo (singer)	April 29, 1965
Celia Franca (ballet)	May 6, 1965

with Actors and Show people:

Signe Hasso	January 21, 1965
Myrna Loy	February 18, 1965
Jason Robards	March 18, 1965

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Each guest discusses his particular field, cultural trends in that area, his contemporaries, his special work, talent, background, aspirations, etc.

There's a large category of people who have been on "Guest Book" whose names are well-known in the San Francisco-Oakland Area but not elsewhere. Some of these prominent leaders and representatives of local organizations who contribute their time and effort to the entire community are:

Gerd Wallenstein, of the California Youth Symphony.
"Discussing the possibility of a South American Tour for the Orchestra." (5/27/65)

William Jackson, Conductor of the Richmond Symphony Orchestra (a semi-professional group of musicians) discussing "The Difficulties of Presenting Concerts in a Smaller City." (4/1/65)

Mrs. Mortimer Fleishhacker, who works hard the year around to organize money-raising projects for KQED, the educational television station. (3/25/65)

[229] THE GOOD LIFE

Another stimulating weekly series — a discussion feature designed for women. Controversial topics are discussed frankly by leading personalities in these outstanding programs — the first ever produced by the Episcopal Church concerning the special interests and problems of the modern woman. In weekly 15-minute interviews, issues of the day are examined as they affect "Women and the Family." The Moderator, Jane Martin, invites free expression of opinion from leading personalities on a wide range of important subjects.

Although the format of the program makes it possible for discussion to be flexible in subject areas, only the principal area is listed herein.

Examples of guests and subject areas on 1964 programs are:

Marriage and Home

Dr. Joseph Fletcher – Professor of Christian Social Ethics. "Birth Control."

Dr. Hyman Spotnitz – Psychiatrist and Author. "Fidelity and Infidelity in Marriage."

Anne W. M. Wolf – Of Child Study Association and Author. "Rewards and Responsibilities of Being a Parent."

Children and Education

Dr. Adolph G. Anderson – Educator. "Value of Intellectual Discipline."

A. D. Buchmueller – Executive Director of Child Study Association of America. "Rearing of Children in the Nuclear Age."

Mrs. Ralph Bunche – Vice President, Play Schools Association. "Educational Value of Play Schools and Their Role in a Community."

Francis T. Carmady – Vice President, Child Welfare League of America. "Cruelty to Children."

Grace and Fred M. Hechinger – Co-authors and editors. "Relationship between Parents and Teen-Agers."

Dr. Theodore H. Lang, Chairman, New York's Civil Service Commission. "Reasons for High School Dropouts and Methods of Prevention."

Mary Perkins Ryan, National Chairman of Catholic Organization and Author. "Parochial Schools versus Public Schools."

Problems in Her Society

Peter Blake, Architect and Editor. "Desecration of American Cities, Suburbs and Rural Areas."

Dr. Alexander Gralnick, Hospital Medical Director. "Mental Illness and Psychiatry."

Dr. Joseph H. Peck, Physician, Humanitarian and Author.
"Problems of the Aged."

Dr. Joseph R. Washington, Chaplain, Professor of Religion
and Author. "Negro Religion in a White Culture."

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VIEWPOINT

Presented weekly in conjunction with the National Council of the Protestant Episcopal Church.

In recognition of its outstanding achievement "Viewpoint" was selected by the National and School Awards Jury of the Freedoms Foundation to receive the George Washington Honor Medal Award for helping to bring about a better understanding of the American Way of Life.

"Viewpoint" presents outstanding figures in different fields in revealing interviews providing the public with uncommon insight into the lives of outstanding figures of our times. Again, although the program format makes it possible for discussion to be flexible in subject areas, only the principal area is listed herein.

Examples of Guests and Subject Areas on 1964 Programs are:

Our Changing Society *The Christian Heritage*

Dr. Richard S. Gordon, Director, Research Department, Monsanto Co., St. Louis. "The Meaning of Religion in Science."

The Rt. Rev. Walter Henry Gray, Bishop, Diocese of Connecticut. "Morality Today."

John Lawrence, Editor. "Editor's View of Some Universal Issues Facing Modern Man."

Reuben H. Mueller, President, National Council of Churches. "Christianity in Today's World."

The Rev. Canon Frank, Principal of Christ Church, Cottage, New Zealand. "The Bible in Today's World."

Marshall W. Fishwick, Director of Weems Foundation, Fulbright Lecturer and Author. "Good and Evil in Our Society."

Mrs. Harold Sorg, Presiding Officer, Triennial Meeting of Women, Episcopal Church. "Women's Role as Function of Her Individuality."

The Rt. Rev. John A. T. Robinson, Suffragan Bishop of Woolwich, England. "Anglican Bishop's Interpretation of the Christian Individual's View of God."

Vance Packard, Author. "Invasion of Individual's Privacy by Modern Investigative and Surveillance Practices."

Dr. Ralph G. Jones, Professor, University of Arkansas. "The Individual and 'Big' Government."

The Family

Phyllis McGinley, Pulitzer Price-winning Poet and Author. "The Role of Wife and Mother Today."

Bernard Berelson, Sociologist. "Human Relationships."

Margaret H. Benson, Christian Educator and Author. "Values in American Family Life Today."

Dr. Virgil G. Damon, Obstetrician and Gynecologist. "Marriage and Infertility."

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KKHI - "DISCUSSION PROGRAMS"
"TELEMUSIQUIZ"

KKHI airs a daily 15 minute combination "discussion-instructional-informational-entertainment" type program dealing with the history, background, knowledge and opinions of classical music, composers, opera, etc. This is conducted via telephone with our listeners talking to the moderator. Since much of the discussion involves varying opinions and

comments, we have classified this as "discussion" for three out of five days.

Classical music represents KKHI's sole program product so the general purposes of Telemusiquiz are (a) to stimulate the listener's thinking and discussion and arouse a deeper interest in the world of classics and (b) to increase his musical knowledge through the discussion and informational material he absorbs while listening to the opinions and thoughts of other individuals participating in the program with Moderator Bill Agee.

Each program is based on three questions as discussion "starting points." Listeners telephone in and an exchange with the moderator ensues as listeners strive for the right answers through questions, historical references, clues, comparisons, etc. Such discussion elicits a variety of information and opinions — which in turn stimulates other listeners into further thought.

Examples of questions (and the correct answers sought):

1. For what purpose was this music written? (Kodaly's "Psalmus Hungaricus" was written for the 50th anniversary of the merging of Buda and Pesth into one city. Other pieces were written for the 50th anniversary of the Boston Symphony Orchestra, for the opening of New York's Center for the Performing Arts, etc.)

2. What's going on off-stage while this music is being played? (Music is the "Dance of the Hours." LaGioconda is supposedly breathing her last after having been given poison, all stretched out on her bier. Actually the Old Blind Lady switched the bottles, and she got the knock-out drops.)

3. What does this music have in common with an architectural gem? (The music is Rachmaninoff's "Isle of the Dead." Architect Bernard Maybeck designed the Palace of Fine Arts for the 1915 World's Fair in San Francisco after a picture of Arnold Bocklin — the same painting that inspired Rachmaninoff's tone poem.)

One sample topic would evolve as follows: (Question) — Who was the composer, when, under what special circumstances, etc. — of this piano composition? (Answer material and discussion background) — Wagner. Wagner didn't write many piano pieces and this particular one doesn't sound like his later operas in any sense of the word. It has no distinguishing characteristics. Various callers may identify it as a Mozart or Beethoven or some other piece, give dates, titles, opinions. The Moderator informs the callers (and the radio audience simultaneously) that it is not Beethoven or Mozart, and an exchange of opinions follows. All callers add their thoughts and opinions to the general fund of knowledge..... that the composer was German; that it was Wagner, that Wagner was more famous in another sphere of composition; his life in the middle 1800's is discussed; Wagner *did* write little piano pieces, (a generally unknown fact); some are identified and discussed; and listeners learn from such facts and thought exchanges that Wagner did not spring full-blown into the "Ring of the Nibelungs."

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Exhibit No. 11

KKHI-SECTION IV, PARAGRAPH 10, ADDITIONAL
DATA FOR THE COMMISSION'S ATTENTION

KKHI AM and FM, in the major San Francisco market with a large number of AM and FM facilities, aims for a highly specialized audience appeal. Therefore our program proposals are based predominantly on a classical music format of broad interest. We show 88.23% of "Entertainment" (all classical music), 7.47% of "News," 1.19% in "Religious," 1.19% "Educational" and 1.32% as "Discussion."

We believe that while we must air a certain amount of "Religious", "Educational" and "Discussion" programs, the basic attraction to current and potential KKHI listeners lies

exclusively in our classical format which does not currently exist elsewhere in full-time San Francisco AM radio. We respectfully submit for the Commission's consideration our conviction that present and/or potential listeners will tune in and/or remain tuned to KKHI almost solely because of our music programming appeal and not in any significant degree because of "Religious", "Educational", or "Discussion" programs. We believe every possible minute should be devoted to broadcasting and encouraging interest in classical music.

KKHI's aim is consistency in program pattern so AM and FM listeners will know at any time where they can find their favorite "Music of the Classics". Our programs cover the entire spectrum of serious and modern classical music.

KKHI represents the only combined AM-FM "Music of the Classics" programming in San Francisco-Oakland and all of Northern California. Listener reports, contacts and correspondence substantiate a surprisingly large audience even outside our local area. Our penetration to the South reaches Monterey and Carmel. In the East we retain a steady audience in the Sacramento region. In the North outside of California we have many regular listeners in Oregon, Washington, Idaho, even Alaska. We've received numerous indications that these people listen to KKHI because fulltime classical music is not accessible on their local radio dials, or if so, the service is unsatisfactory when compared with ours.

Buckley-Jaeger acquired KKHI-AM and FM in March, 1964. In May of that year we conducted a community survey in an effort to determine the qualitative characteristics of our audience. Questionnaires were sent to 600 KKHI listeners chosen at random from those who had previously communicated with the station on a variety of subjects. Within 18 days, a 75% return had been realized—astonishing for any survey—demonstrating that our "Classic Stations" audience is responsive, interested, and sensitive.

KKHI listeners are predominantly adult. 79% are over 21. 53% are between 21-49 years. They are well educated—65% of male heads-of-household have a degree. 91% have some college education. One out of every four heads-of-household is a professional—a doctor, lawyer, teacher, member of the clergy—a reflection of the high education level. KKHI listeners attend concerts, operas and recitals regularly—29% in a sample week; 60% in a sample month. In the previous year, more than 2,500,000 people attended serious music events in San Francisco—compared with 1,571,000 attendance for Giants baseball.

Again in September, 1964 KKHI-AM and FM surveyed its audience via questionnaires to 1,600 listeners, querying them regarding their tastes in all music categories. Again an astonishing return! 1,100—or 70%—responded this time!

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In a ratio of 40 to 1, and in the strongest possible manner, these listeners unequivocally stated their desire that KKHI-AM and FM remain exactly on its present program format of classical music. Almost all stated bluntly—"Don't change a thing!" or other equivalents. (The survey material and responses, or a digest of them, is available to the Commission staff.)

Within the last year, Broadcast Music, Inc. issued some interesting statistics on the development and increasing popularity of classical music in this country. Concert music in one form or another is increasingly becoming a major part of the American way of life. No country in the world comes close to the United States in symphony orchestras. The number of American symphonies has more than doubled—from about 600 in 1939 to 1,442 in 1964—more than half of the world's symphonies. There are now approximately 800 opera-producing groups in the United States. Today more than 11,000,000 Americans play musical instruments and receive musical instruction in schools and with private teachers, compared with 2,500,000 in 1947.

When Buckley-Jaeger commenced operation of KKHI-AM and FM in March, 1964 its primary objective was to program as many outstanding features as possible in the "Music of the Classics" field. We recognized the San Francisco-Oakland area as one of the most cultural large-city markets in the United States. It has two outstanding symphonies—the San Francisco Symphony Orchestra under the leadership of Josef Krips, and the Oakland Orchestra under the direction of Gerhard Samuel.

San Francisco also supports an Opera—second only to the New York Metropolitan Opera. San Francisco has an outstanding Ballet Company. In the 9-county Bay Area there are dozens of other symphony orchestra organizations—many originating in the music departments of our colleges and universities. The 9-county Bay Area is a center of education and culture and supports almost 100 colleges, universities and junior colleges. All this adds up to a large potential audience for a classical music station especially on a combined AM-FM operation.

Symphony orchestra concerts are seasonal and do not run on a 52-week continuous basis; therefore our frequent *live* broadcasts are not usually reflected as "live" programming in Composite Week calculations. However following is a complete outline of our special symphony presentations. In the 1964-65 season KKHI AM and FM broadcast nine concerts of the San Francisco Symphony, originating *live* from the War Memorial Opera House. These concerts can be heard *only* on KKHI-AM and FM. They hold great interest because of the small capacity of the Opera House; and there's an active subscription list of over 35,000 Bay Area residents who strongly support this world-renowned organization. We are planning the same schedule for the 1965-66 season.

KKHI-AM and FM will present *live* all concerts in the new Oakland Orchestra season. The "Oakland" has developed into an outstanding professional organization and in 1964-65 enjoyed the most successful season in its history. Eight

concerts were broadcast *live* by KKHI from the Oakland Civic Auditorium Theatre. That season was so successful that the 1965-66 series is completely sold out with KKHI-AM and FM broadcasts to originate again from the Auditorium Theatre.

KKHI volunteered its services to ensure the 1965-1966 Season becoming a sellout. The Oakland Symphony Ladies' Guild organized committees and KKHI provided incentive prizes. There was a sellout of all season tickets in five weeks. This exhibit contains a reprint from the SAN FRANCISCO CHRONICLE—a dramatic testimonial to the ability of KKHI to produce a successful public service result—another KKHI community participation success story.

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Last season we also carried—exclusively in Northern California—the complete series of *live* broadcasts of the New York Philharmonic from Lincoln Center in New York—for 34 consecutive Sundays. This series is scheduled for next season also.

And on Sunday evenings KKHI-AM and FM last year broadcast the famed Philadelphia Symphony Orchestra for 26 consecutive weeks. Plans are not finalized at this writing, but KKHI may broadcast the Boston Pops Orchestra under Arthur Fiedler in the 1965-1966 Season, instead of the Philadelphia Symphony. One or the other is a certainty for inclusion in our schedule.

In addition to all the above Symphonies KKHI AM and FM will present the famed New York Metropolitan Opera—the entire season of 20 performances *live* beginning Saturday, December 4, 1965.

With the signing of the Metropolitan, KKHI has truly scored a "grand slam" in classical music features with this outstanding lineup: [sic]

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New York Metropolitan Opera	(Live)	Saturdays	Begins 11:00AM (3 hrs. or more)
New York Philharmonic	(Live)	Saturdays	8:00-10:00PM
Oakland Symphony	(Live)	Wednesdays	8:30-10:30PM
Philadelphia Symphony or	(Tape Delay)	Saturdays	10:00PM-12 Mid.
Boston Pops Orchestra			
San Francisco Symphony	(Live)	Fridays	8:30-10:30PM

In addition to these outstanding features KKHI AM and FM present a daily broadcast fare of "Music of the Classics"—covering the complete range of familiar Classics, concertos, tone poems, suites, favorite arias and choruses from the World of Opera, the works of the Romantic composers and recorded music of the great symphonies. These are offered in a balanced manner from 6:00 AM to Midnight, keeping in mind the work schedules and probable hours of relaxation of our 4,000,000 Bay Area residents.

In every area where KKHI discovers an opportunity to become more deeply involved in the San Francisco-Oakland community, it does so.

Following are two examples. First—our cooperation with Educational TV Station KQED on Channel 9 in San Francisco. During the first week of June 1965, KQED held its annual "auction" to raise funds for continued operation. Various local business organizations contributed items which were demonstrated on TV and then auctioned off—with bidding done by telephone. One of KKHI's contributions was a 10-day trip for two to Paris and London with hotel accommodations in both cities, and a Rolls-Royce and driver in both cities. This European trip brought a high bid of \$2,300 to the KQED "Educational-TV auction." An additional KKHI contribution was a "Night at the San Francisco Opera" with "all the trimmings"—including chauffeur services in the KKHI Rolls-Royce, dinner for two at the St. Francis Hotel, and 2 opera seats. This item brought a high bid of \$700 from a listener towards the "Educational-TV Operating Fund Auction."

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Here's a second example. During each Christmas Season we broadcast the Annual "Choir Festival and Candle Illumination" from the "Chapel of the Chimes" in Oakland. In addition to nightly broadcasts of the "Choir Festivals", there are Festival exhibitions of religious-oriented historical documents, art and sculpture. These are very important local annual events.

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KKHI EDUCATIONAL PROGRAMS

The Composer's Corner

This "educational" program is presented Monday, Wednesday and Friday from 1:30-1:55 PM. Most classical music listeners are aware of course of the lives and general background of Mozart or Bach or Beethoven but there are hundreds of lesser composers who are practically unknown but who have made substantial and worthwhile contributions in the classical music field. The bare biographical bones—birth and death dates, names of principal works, etc., are readily available; but except for a college course in music appreciation the relationship of such composers to their times presents a difficult if not impossible research chore to the average classical music devotee.

A more genuine appreciation of any art, literature, painting, architecture, drama, sculpture or music, is enhanced by relating it to its historical background. Music doesn't necessarily require a story to give it validity or meaning—any more than the story that da Vinci's servant was the model for his "Mona Lisa" makes that painting more enjoyable. But the gradual shifts and evolutions of musical forms, styles and types do become more understandable to interested radio listeners when they are demonstrated and explained in relation to the times in which they occur.

This is the purpose of "Composer's Corner": To inform the interested listener by introducing him to composers and music he might not otherwise meet, and by relating the music to its era in history. The following sample program script illustrates how the program is handled daily.

(There are other "educational" features included in "The Composer's Corner" program. These are detailed later in this Exhibit, immediately after the following sample musical script.)

ANNCR: Welcome to the "Composer's Corner", the story of the life of a famous composer and excerpts of his works. Today, the Russian composer, Michael Glinka.

Glinka was born in Smolensk in 1804. He grew up on his wealthy father's country estate, where he heard not only folk music, but also the performances of his father's private orchestra. He went to St. Petersburg and studied piano with the Irishman, John Field. He gave up a civil service position because of ill health, and went to Italy where he became familiar with Italian opera and with the composers—Bellini and Donizetti. In his late 20's he decided to write a Russian opera; to acquire technique he studied diligently in Berlin, then returned to Russia. His first opera was "A Life For the Czar." He wrote to a friend: "I fancy I have the ability to enrich our stage with a big work. But it won't be a masterpiece." After much searching, he decided on a story, and for the libretto, turned to Baron Rosen, a German who was secretary to the Czarevitch. The Czar himself attended a rehearsal, and accepted the dedication. On the night of November 27, 1836, "A Life For the Czar" had its premiere, and Glinka was established in the front rank of Russian music, and indeed, Tchaikowsky placed him on a level with Mozart.

Igor Markevitch now conducts the Lamoureux Orchestra and Belgrade Opera chorus in the triumphant finale from Glinka's opera, "A Life for the Czar."

—MUSIC—

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KKHI EDUCATIONAL NEWS
AND INFORMATION FEATURES

A substantial amount of "educational news" is available from colleges, schools, and educational-oriented groups in

our coverage area. The aforementioned "Composers' Corner" material constitutes the musical educational aspect of the program. In addition we include in each broadcast "educational news and information" items on behalf of institutions such as University of California; San Francisco State College, San Rafael; College of Marin, Kenthill; Chabot College, San Leandro; College of Notre Dame, Belmont; Foothill College, Los Altos Hills and College of San Mateo.

These institutions understand that this time period is always available for their use, at their request. The total "educational" content is approximately 7-8 minutes. Past experience indicates that on certain days a diminution in material flow occurs for various reasons. Our only solution then is to use all suitable available information copy and fill out the period with music. In our territory many educational institutions continue with summer sessions so this flow of material doesn't diminish completely during the normal summer vacation period.

The informational items included in "Composers' Corner" programs deal with a broad variety of subjects such as

- News of Local Schools & Universities
- News about Students, Teachers
- Trends in Education
- Research Reports
- Editorials
- School Construction & Fund Raising for Same
- Financial Aid to Education
- Special Educational Musical Programs
- Lectures on a Variety of Subjects
- Art Shows and Exhibits, Classical Films
- Adult Education Courses
- Summer Schedules
- Academic Honors
- Academic Opportunities
- Special Lectures
- Awards of Faculty Research Grants
- Scholarship Awards

Fraternity & Sorority News
Student-Produced Plays & Shows
Choir Recitals
Debating Society Activities
Sporting Events

—all of intense interest to people involved in or interested in “education”—whether student, parent, teacher, school principal, professor, college president, school board member or governmental official.

Following are examples of sources, subjects and scripts illustrating the type and presentation of this variety of material.

University of California, Berkeley:

Concert — Fenner Douglass, organist
Display — Etruscan Vases in Art Gallery
Exhibition — Northwest Indian Art in Museum of Anthropology
Concert — Borodin Quartet in Hertz Hall
Film — “The Scarlet Letter” (1925)
Concert — Leonard Shure, Pianist

San Francisco State College:

Poetry Workshop — for teachers

St. Mary's College, San Rafael:

Art Exhibit — Photographs and Sculpture
Seminar — “Dynamics of Vocational Counseling”

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KKHI - RELIGIOUS PROGRAMS

Unity Viewpoint

KKHI presents “Unity Viewpoint” Monday through Saturday, 12:00 Noon-12:15PM. The parent organization is the “Unity School of Christianity,” Lee’s Summit, Missouri but the programs are produced “live” locally in San Francisco

by Mr. Sam Watts. They are "local live programs" produced by the station but recorded for later broadcasting.

"Unity Viewpoint" programs are of a broad general religious nature dealing with different phases of spiritual life each day; with the events of our times, their effect on, and their connection with the daily life of the average human being. Mr. Watts deals with the individual's daily problems of living and how his mode of life relates to the Bible's teachings. He illustrates how Bible study and an individual's following of the Bible's precepts can help bring peace of mind. On certain days a specific religious or religious-connected topic is treated; at other times a variety of related spiritual subjects form the program structure.

In the KKHI coverage area there are 5 local "Temples" affiliated with the parent "Unity School of Christianity". Announcements on behalf of these local "Temples" are broadcast in connection with the program itself.

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KKHI - EDUCATIONAL PROGRAMS

"I AM AN AMERICAN" - A Musical "Hall of Fame" - represented the 1964-65 series of Standard School Broadcasts, scheduled weekly on Thursdays from October 15, 1964 through May 6, 1965 at 11:00 AM on KKHI-AM and FM.

These School Broadcasts will resume in the Fall of 1965 with the 38th series titled "We Are Americans". Each program will be devoted to the story of an individual ethnic group represented among Americans of today. As of the preparation date of this application, full program details for this series are unavailable. Therefore in order to illustrate the type and value of this educational programming and its direct use in local schools, we will describe the 1964-65 series in detail.

A specially-prepared "Teacher's Manual" was used as a guide to classroom utilization of the 37th Annual Series.

These broadcasts were heard by thousands of students and their teachers in local schools and by thousands of adult listeners at home.

This course—titled “I AM AN AMERICAN”—was the second series of “musical portraits” of 25 noted Americans honored by election to The Hall of Fame for Great Americans at New York University. An introductory program was devoted to The Hall of Fame. Subjects of the 26 weekly half-hour programs are shown below. The programs were related to American history during the 280 years from William Penn’s birth in 1644 to Woodrow Wilson’s death in 1924. Sketches of the 25 Americans and of objects associated with their lives provided themes for student art work.

Program	Subject	Program	Subject
1	The Hall of Fame	16	Robert Edward Lee
2	William Penn	17	Thomas J. “Stonewall”
3	Benjamin Franklin		Jackson
4	George Washington	18	James Buchanan Eads
5	John Adams	19	Ulysses Simpson Grant
6	John Marshall	20	Edwin Booth
7	John Quincy Adams	21	Phillips Brooks
8	James Madison	22	Charlotte Saunders
9	Robert Fulton		Cushman
10	James Fenimore Cooper	23	Augustus Saint-Gaudens
11	John James Audubon	24	Edward Alexander Mac-
12	Sidney Lanier		Dowell
13	Stephen Foster	25	Alexander Graham Bell
14	Harriet Beecher Stowe	26	Woodrow Wilson
15	Abraham Lincoln		

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KKHI — CONSIDERATION OF LOCAL LIVE “PROGRAM UNITS”

Existing program analysis paragraphs in Section IV fail to reflect an accurate, complete picture of a specialized station’s program structure. KKHI’s programs consist primarily of classical music and hourly 5-minute newscasts. Then we seek additional areas of difference by using certain public

service, cultural, informational and/or talk material—especially-produced brief program insertions of particular interest to KKHI's selective audience. Many features tie directly into the community and its activities; others are designed as service and informational features in subject areas known to hold special appeal for our listeners.

Much of the aforementioned copy often used in 5, 10 or 15-minute program form on old-line network-type stations is incorporated into KKHI's entire daily program structure in short segments up to one-minute in length. Our total amount of such time may equal that broadcast by old-line stations but it's not reflected in our Composite Week performance because it isn't considered "*program time*" under the present Section IV.

~~KKHI~~ accommodates public service needs very effectively by airing brief features frequently rather than by relegating the same material to relatively infrequent strips of "program" time—which reach only fragments of the total audience. Brief "identifiable units of program material" containing simple facts and information, easily remembered, quickly acted upon, reach practically all listeners at frequent intervals. KKHI's "local live" programming and program "type" percentages would be increased if we were allowed to define a *program* or *program time* as an "identifiable unit of program material."

Many stations utilize the device of presenting informational and public service material on behalf of local civic, charitable, religious, educational and cultural organizations grouped in 5, 10 or 15-minute programs—thereby gaining credit as "local live" *programs*, even though said material is actually a combination of different *announcements* on varied topics. Nonetheless this device qualifies as "program" time. Local organizations favor KKHI's use of their material in frequent but brief program units throughout our entire schedule. But although we achieve maximum impact and flexibility and most effectively serve their needs, this material cannot be classified as "live" or even under "type" classifications.

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Examples of special KKHI features are

- “KKHI CALENDAR OF CULTURAL EVENTS”
- “KKHI MUSICAL PREVIEWS”
- “KKHI GALLERY GUIDE”
- “KKHI TRAVEL NOTEBOOK”
- “KKHI LINES ABOUT WINES”

KKHI CALENDAR OF CULTURAL EVENTS

The title aptly describes this feature—a listing of major musical and dramatic happenings in the Bay Area. It varies in length depending on day or season. We favor the community's semi-professional or amateur groups who can't afford to pay for publicizing their events. The CALENDAR is broadcast three times a day: 10:50AM, 3:30 and 10:00 PM, every day but Sunday.

BRIEF FOR APPELLANT-PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,017

BUCKLEY-JAEGER BROADCASTING
CORPORATION OF CALIFORNIA,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

*APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION*

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Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

*PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION*

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the refusal to grant the "exemption request" upon the showing made violated either Section 326 of the Communications Act of 1934, as amended, or the First Amendment to the United States Constitution.
2. Whether the refusal to grant the "exemption request" upon the showing made was arbitrary, capricious and contrary to the Commission's own 1960 "Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry."
3. Whether the Commission's refusal to grant the renewal application on the terms and conditions requested constituted an unlawful denial of the application without hearing, contrary to Section 309(e) of the Communications Act of 1934, as amended.
4. Whether the Commission's denial without hearing of the "exemption request" constituted an unlawful modification of the outstanding FM license, contrary to the provisions of Section 316(a) of the Communications Act of 1934, as amended.*
5. Whether, upon the showing made, the Commission's refusal to grant a hearing on the "exemption request" under Section 73.242(c) of the Rules, was arbitrary, capricious and contrary to law.

* Appellee-Respondent does not concede that Issue No. 4 is properly before the Court.

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Respondents.

**PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION**

BRIEF FOR APPELLANT-PETITIONER

JURISDICTIONAL STATEMENT

This Appeal and this Petition for Review seek review of the Memorandum Opinion and Order of the Federal Communications Commission, released April 27, 1967, and accompanying letter, which denied Appellant-Petitioner's

(hereinafter referred to as "Appellant") Request for Exemption beyond August 1, 1967, from the requirements of Section 73.242(a) of the Commission's Rules. (R. 219-226).

The Notice of Appeal was filed by Appellant pursuant to Sections 402(b)(2) and 402(b)(5) of the Communications Act of 1934, as amended. (Act of June 19, 1934, c. 652, 66 Stat. 718, 47 U.S.C. § 402(b)(2), 402(b)(5). The Petition for Review was filed pursuant to Section 402(a) of the Communications Act of 1934, as amended (66 Stat. 718, 47 U.S.C. Section 402(a) and Sections 2, 3, and 4 of the Judicial Review Act (Act of December 29, 1950, C. 1189, 64 Stat. 1129, 5 U.S.C. 1032, 1033 and 1034).

STATEMENT OF THE CASE

The Commission's Memorandum Opinion and Order and its Letter, both released April 27, 1967, from which this Appeal and Review are taken, denied the request of KKHI-FM for an "Exemption" pursuant to Section 73.242(c) from the requirements of Section 73.242(a) of the Commission's Rules. (R. 219-25, 226) Section 73.242(a) requires that frequency modulation (FM) stations in cities of over 100,000 in population shall operate so as to devote no more than 50% of the average FM broadcast week to programs duplicated from a standard broadcast (AM) station owned by the same licensee in the same local area. (47 C.F.R. 73.242(a)). For years prior to the adoption of this rule, many commonly owned AM and FM Stations in the same market had duplicated the AM programming over the FM Station.

This new rule stemmed from rulemaking proceedings, adopted effective August 13, 1964, in Docket No. 15084.¹ The Commission concluded that with the increasing commercial utilization and success of the FM spectrum, whole-

¹ 29 F. Reg. 9492, 2 Pike & Fischer R.R.2d 1658 (1964).

sale duplication of programming between commonly owned AM and FM stations was no longer appropriate.

At an earlier stage the Commission had encouraged FM station development by allowing owners of AM stations to construct FM stations and then permitting them to save operating costs by duplicating 100% of the AM programming. The Commission concluded in Docket No. 15084 that this now constituted a waste of valuable spectrum space.

It, therefore, adopted Section 73.242 providing for 50% independent programming. However, paragraph (c) of that Section provided:

"Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of paragraph (a)...."

Paragraph 46 of the rulemaking Report and Order is the only paragraph explaining this provision for "exemptions" (2 Pike & Fischer R.R.2d at 1678). Paragraph 46 states that "exemption" requests would be entertained where an applicant could make "a substantial showing that the public interest—as opposed to the private interests of the licensee—would be served by allowing unlimited program duplication for an additional period of time". The Commission expressly recognized that additional requests could be made at the end of each license period. (*Ibid.*)

Appellant operates Stations KKHI-AM and KKHI-FM in San Francisco, California. Both Stations broadcast exclusively "the Music of the Classics". Appellant filed, on February 1, 1965, its "Request for Exemption Pursuant to Section 73.242(c)", requesting that it be granted permission to continue its unique "quality music" format with 100% AM-FM duplication to run to the end of the license term, December 1, 1968 (R. 1-24). Supporting information and an additional request were submitted later. (R. 25-58).

While the "Exemption Request" was pending, Appellant filed its applications for renewal of licenses for both KKHI

and KKHI-FM on August 20, 1965, which had become due in the normal course. As part of the application for renewal of KKHI-FM, the application form called for a complete statement of the program plans for the future three year license period.² KKHI-FM set forth its proposal to continue the 100% duplication of the quality music program format of KKHI-AM, and made an extensive showing in support of continued duplication; an express "Request for Exemption" was made in the renewal application for the full license term ending December 1, 1968 (R. 59-78, 227-259).

Thus, in the Fall of 1965, both the renewal application with its fully documented "Exemption Request" and the earlier "Exemption Request" were before the Commission. On November 5, 1965, the Commission granted the renewal applications of KKHI-AM and FM. The FM grant was made "without prejudice to whatever action the Commission may take on your pending request for waiver of the requirement of your compliance with Section 73.242 of the rules." (R. 104-105). No action was expressly taken on the "exemption request" included in the renewal application.

Appellant considered that its FM application had not been granted in accordance with the programming and operating proposals it had set forth. It concluded that under Section 1.110 of the Commission's Rules (47 C.F.R. Sec. 1.110), the Commission had in fact made a "partial grant" to KKHI-FM, i.e., a grant that differed from the terms requested. Consequently, on November 30, 1965, pursuant to Section 1.110, Appellant requested reconsideration of its "partial grant"; it asked that the Commission either grant the "Exemption Request" or designate the "Exemption Request" for hearing. Appellant expressly rejected the renewal grant that had been made subject to later action on the "Exemption Request" and stated unequivocally: "Buckley-Jaeger does not consent to having its request for exemption determined on the pleadings in the separately pending proceed-

ing involving petitions by over 100 licensees for temporary exemptions." (R. 106-08).

The Commission never acted on this November 30, 1965, rejection of the "partial grant" and request for hearing. On March 15, 1966, it acted on the original "Request for Exemption" and granted KKHI-FM a "temporary exemption" to April 1, 1967, but solely "because of the individual economic circumstances involved"; it gave KKHI-FM the right to file a further request for exemption by February 15, 1967 (R. 109-150, 111). This was a "limited" exemption granted to a number of stations alleging economic hardship. The uniqueness of the KKHI-FM operation was not considered.

Pursuant to the right granted in the March 15, 1966 Order, KKHI-FM on January 25, 1967, again renewed its basic request for an exemption and called the Commission's attention again to its earlier rejection of the "partial" renewal grant (R. 151-217). Appellant argued that if the Commission was not persuaded to grant the exemption, then Appellant demanded a hearing, stating that (R. 165):

"... it would be able to introduce the testimony of its listening audience and of prominent representatives of civic, fraternal, educational and other public service groups in the Bay Area in support of its position. Buckley-Jaeger will be able to prove through disinterested public witnesses that the public interest would be served by continued AM-FM duplication."

The Commission's Memorandum Opinion and Order of April 27, 1967, here under review, rejected Appellant's arguments on the merits, declined to grant the "exemption" beyond a limited period ending August 1, 1967, and refused also to order a hearing on the "exemption request". (R. 219, 222-223). Its grant of an exemption to August 1, 1967, was solely a matter of administrative convenience to permit orderly compliance (R. 223, 225).

Of critical importance on this appeal are the stated facts and arguments in support of the "exemption". Appellant argues that these facts justify a grant of the "exemption"

as a matter of law or at the very least, raise sufficiently important questions to justify a hearing. So that the Court may evaluate Appellant's position, the facts and arguments supporting the exemption are summarized as follows:

(1) KKHI-AM and FM are the only full time AM and FM facilities programming exclusively "The Music of the Classics" in the sixth largest market in the country. (R. 2)

(2) The AM-FM listening audience far exceeds the immediate San Francisco-Oakland Bay area and reaches as far south as Monterey and Carmel, as far east as Sacramento, and far north into Oregon, Washington and Idaho. The outlying audience desires this continued high quality because such programming is not available over their local radio services. (R. 2)

(3) The KKHI-AM-FM audience is not divisible. It listens in a variety of locations and under a variety of circumstances. When at home or at a place where high quality reception equipment is available, many prefer to listen on FM because of the better quality of FM reception, particularly important for classical music. Then there are times when the audience prefers to listen on AM in the home or in automobiles, or on portable sets at work, or at play. They prefer the continuity of listening to the same selection whether they move from AM to FM or from home to car. (R. 3)

(4) In May of 1964, a survey was conducted of some 600 KKHI listeners, picked at random, to determine the characteristics and interests of KKHI's audience. This survey showed that the KKHI listeners tuned to both AM and FM interchangeably in a variety of places. A total of 83% listened on AM and a total of 63% listened on FM. The licensee concluded, based in part on this survey, that the audience preferred the continuity of duplication and wanted the same classical programming on both stations. (R. 4-7)

(5) To further test this, a second survey was conducted in September of 1964 among 1,600 listeners

querying them regarding their interest in various music categories. In a ratio of 40 to 1 the listeners unequivocally stated their desire that KKHI-AM and FM remain exactly the same, bringing continued high quality classical music to their area. (R. 7-8)

(6) The applicant demonstrated through its audience surveys that to adopt an entirely different format on one or the other of the channels would seriously offend the existing audience and would not serve their interests. (R. 8)

(7) To stay with the same format but simply provide different classical music selections would be wasteful, expensive and constitute a minimal contribution to program diversity and would not really meet the basic purpose of the non-duplication rule. (R. 8, 77)

(8) There are 23 AM stations and some 34 FM stations in the San Francisco Bay area with formats which cover every conceivable type of programming. Only KKHI-AM and FM have the high quality classical music format and are unique in the area. (R. 9)

(9) The KKHI audience itself is unique—it is predominantly adult, well-educated, affluent, and is obviously interested in the classics and good music. (R. 12)

(10) This study of the needs, interests and character of this audience led KKHI-AM and FM to propose simultaneous duplication. The proposal is the direct result of "community probing." (R. 12-13)

(11) The production of high quality classical music programming is very expensive; KKHI-FM has spent large sums upgrading its programming and as a classical station it needs special consideration from the Commission if it is to continue programming to meet the tastes of its sophisticated audience. (R. 13-14)

(12) Program non-duplication inevitably involves substantially increased expenses which, in the case of KKHI-FM, would be at least \$23,000 for con-

struction and renovating costs, and a minimum increase in the annual operating budget of \$66,970. Nor does KKHI have the physical space for new facilities. (R. 14-16)

(13) Additional expenses such as these will cause grave financial distress to San Francisco stations; furthermore, the additional programming would at best be a marginal addition to the classical fare already offered. (R. 18-20, 77, 90-93)

(14) In the specific market of San Francisco, with some 57 stations, the adoption of the Commission's rule will result in a dramatic increase in the number of independently programmed stations. The market cannot support, on an effective basis, 57 separately programmed radio stations. The 1963 financial report shows that the ten *independently* owned FM stations in the San Francisco Bay area lost over \$135,000. Increasing competition by the addition of *all* the commonly owned AM and FM stations doesn't make economic sense. (R. 18-19)

(15) There is currently no dearth of diversified program fare offered in San Francisco. The addition of one more service by KKHI-FM 50% of the broadcast day will have marginal utility, and will be far outweighed by high cost and other disadvantages. (R. 22)

(16) The program showing submitted with the renewal application, filed August 20, 1965, detailed a variety of different types of special interest programming, designed to serve the San Francisco area, including a number of discussion programs (KKHI Guest Book, The Good Life, Viewpoint, "Telemusiquiz"), educational programs (The Composers Corner), religious programs (Unity Viewpoint), educational programs (I Am an American), and a series of special program features tailored to the specialized audience of KKHI (Calendar of Cultural Events, Musical Previews, Gallery Guide, Travel Notebook, Lines about Wines). (R. 227-259)

(17) KKHI brings live outstanding local and world-renowned programming, including the San Francisco Symphony Orchestra, the Oakland Symphony Orchestra, the San Francisco Opera, the San Francisco Ballet Company, the New York Philharmonic from Lincoln Center, the Philadelphia Symphony Orchestra, the Boston Pops, and the New York Metropolitan Opera. In addition to these live features, KKHI-AM and FM presents daily a recorded broadcast entitled "Music of the Classics." These various selections and special programs are presented in a balanced manner throughout the broadcast day from 6:00 a.m. until midnight. There are also a number of seasonal live programs featuring local talent from the San Francisco Bay area, such as Christmas "Choir Festivals," which has six different choirs, and various public school programs. (R. 235-259)

(18) The special programming features described in paragraphs (16 and 17) above are interspersed through the broadcast week as part of the overall treatment of classical music. They are not divisible into either the FM side or the AM side of the band, but rather are a part of the integrated whole format of music designed to reach the KKHI audience. To separate out part of the programming and present different selections or features is wasteful, inefficient and contrary to the programming concept of KKHI. (R. 59-61, 69-75)

(19) KKHI uses both its AM carrier and its FM carrier to bring this highly specialized programming to its audience. The coverage area—running from Carmel on the south to the State of Washington on the north—includes many areas or specific locations where one medium but not both can be received. Also, there are different reception characteristics between the AM and FM dial, each of which attracts different audiences for different purposes. In addition, many listeners use one medium or the other interchangeably for program continuity (See paragraph (3)). Thus, being able to broadcast material

on both AM and FM enables KKHI-AM and FM to reach more listeners under more circumstances, as is preferred by the listeners. Such use does not constitute a "waste" of the spectrum. (R. 70-72)

(20) Not only is the KKHI audience unique (as above described, paragraph (9)) but San Francisco itself is unique. Intellectually and culturally it is a world of its own, with outstanding local symphonies, opera, ballet, over 100 centers of education, and other cultural pursuits. This great potential in the San Francisco Bay area offers an unusual opportunity for KKHI-AM and FM to provide quality service. (R. 73-74)

(21) There is already a multiplicity of programming services on over 50 other stations in the market. (R. 76)

(22) To force non-duplication upon KKHI, forces it to overlook its local responsibility to its audience and the clearly expressed opinions of its listeners and civic leaders. (R. 78)

(23) In September, 1965 a third survey was conducted among 2,000 listeners, for the purpose of determining how the audience would react to the Federal Communications Commission's non-duplication rule. The listeners were asked whether they would prefer that KKHI continue as a combined operation broadcasting the same classical music, or whether they would prefer KKHI to do a different type of programming, at least 50% of the time. 98% answered that they wanted the present format to continue exactly as it was. (R. 80, 87). Attached to this showing were the general comments of over 125 listeners reflecting the above opinion. (R. 90, 103)

(24) In May of 1966, KKHI conducted a further survey (its fourth) to determine the nature of KKHI's listeners and also to determine the needs and interests of its listeners. The same general type of audience was attracted to KKHI-AM and FM, as was established in earlier surveys. The survey showed that

they use both AM and FM radios interchangeably and extensively, that 88% listen on AM, 67% listen on FM, and that 55% listen on both. (R. 156, 170-200)

(25) In December, 1966 KKHI decided to sample this audience again, to determine their preferences regarding the Commission's AM-FM non-duplication rule. Some 2,000 persons were selected at random and 70% responded. This questionnaire added one more question to the basic one of whether the audience preferred KKHI to continue to duplicate programming (96% answered that they did). This new question asked whether they would prefer both KKHI-AM and FM to continue with *classical programs* but with "different programs over KKHI-FM dial from KKHI-AM." Only 20% of those who answered this question indicated that they would prefer different classical programming on the FM! In short, 80% wanted the stations left alone, even where they could get *different* classical programming on each station. (R. 156-157, 168-169)

(26) 976 persons added written comments to their questionnaires. Attached to the Exemption Request were 16 pages of listeners' comments concerning the Commission's rule. All favored continued duplication. (R. 201-216)

(27) The survey reinforces licensee's judgment that its audience, unlike others across the country, is most unique. Obviously, the quality of the classical music offering is what counts to the KKHI audience and not the particular frequency or the particular selection. (R. 160)

STATUTES, REGULATIONS, OR RULES INVOLVED

See Relevant Citations attached,
infra, as an Annex

STATEMENT OF POINTS

1. The Commission as a matter of law should have granted the requested "exemption" since the decision to continue duplication represented a reasonable exercise of licensee responsibility.
2. The denial of the "Exemption Request" without hearing deprives Appellant of its hearing rights under Section 309(e) of the Communications Act of 1934, as amended, and Section 1.110 of the Commission's Rules.
3. Because of the nature of the issue involved and the arguments advanced in the "Exemption Request," the refusal to grant a full evidentiary hearing was arbitrary, capricious and contrary to law.

SUMMARY OF ARGUMENT

The refusal of the Commission to grant the "Exemption Request" of KKHI-FM on the facts of this case constitutes an unlawful refusal to accept the legitimate exercise of licensee judgment as to the selection or programming and method of operation. The limits of the Commission's authority to control programming and operation are set forth in the Commission's "Report and Statement of Policy Re: Commission *en banc* Programming Inquiry." Section 73.242, the non-duplication rule involved in the instant case, does not and cannot supersede the rights guaranteed to licensees and expressed in the Policy Statement to determine the programming they wish to carry.

Here Appellant complied in all substantial respects with the Commission's Policy Statement; it made the type of

"documented submissions prepared as a result of assiduous planning and consultation" as required by that Statement. Its decision to propose continued 100% duplication for its unique "Quality Music" format is a reflection of its good faith efforts to ascertain the community's needs. Based upon this judgment and the public interest factors set forth in the "Exemption Request", the Commission should have granted the exemption pursuant to Section 73.242(c).

Even if the Commission did not abuse its discretion in failing to grant the exemption, it clearly violated Appellant's statutory rights by refusing to designate the "Exemption Request" for hearing. The "Exemption Request" was submitted to the Commission as an integral part of Appellant's application for renewal of license. The refusal to grant the "Exemption Request" with the grant of the renewal application denied Appellant its hearing rights under Section 309 (e) of the Communications Act of 1934, as amended, and Section 1.110 of the Commission's Rules.

Nor does *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956) relieve the Commission from its duty to grant a hearing in this case. The Commission's argument that since it need not designate every "waiver" request for hearing, there was no duty here, is clearly without merit.

Appellant's proposal dealt with programming which goes "to the very essence of the broadcast service." Since under Section 73.242(c) "exemptions" are to be granted where the public interest would be served, the importance of the question and the extensive showing made clearly warrant the holding of a full hearing. Appellant concedes there are rules which, by their nature, would justify the denial of a waiver request out of hand except under most extraordinary circumstances. However, the rule here is not such a rule.

Here, a standard of conduct is established subject to exemptions where the public interest would be served. An "exemption" request filed in good faith, supported by a substantial showing of public interest considerations, should require a hearing if the Commission is unable to grant it

without hearing. The general nature of the rule involved, the need for the development of detailed facts unique to one station and one market, and the need to develop factual and policy considerations which the Commission is not willing initially to accept—all these factors support the requirement of a full evidentiary hearing. The refusal to grant such a hearing was arbitrary, capricious and contrary to law.

ARGUMENT

I

The Commission as a Matter of Law Should Have Granted the Requested Exemption Since the Decision To Continue Duplication Represented a Reasonable Exercise of Licensee Responsibility.

The refusal to grant the "Exemption" on the facts of this case constituted an unlawful refusal to accept the legitimate exercise of licensee judgment as to the selection of programming and method of operation. Continued duplication obviously is not unlawful nor, upon a proper showing, is it contrary to the public interest. Thus the exercise of responsible licensee judgment in such an area is protected by Section 326 of the Communications Act of 1934, as amended, and the First Amendment to the Constitution.³ Furthermore, the exercise of licensee judgment here complies with the requirements of the "Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry."⁴ The Commission's failure to follow its own Programming Policy

³48 Stat. 1091; 47 U.S.C. 326. "Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." U.S. Const., Amend. I.

⁴25 F. Reg. 7291, August 3, 1960, 20 Pike & Fischer R.R. 1901 (1960).

Statement denies Appellant the right to fair and equal treatment.⁵

In connection with both the statutory argument under Section 326 and the argument concerning failure to follow the clearly established Policy Statement, it is important to note that Section 73.242 does not by its terms supersede—nor could it—the rights guaranteed to licensees under the Policy Statement to determine the programming they wish to carry. Indeed, Paragraph (c) of Section 73.242 expressly provides for exemptions “upon a substantial showing that continued program duplication over a particular station would better serve the public interest.”

This is the showing KKHI-FM made. The decision to continue duplication was based on its judgment (supported by extensive surveys) as to what would best serve its specialized audience. The conclusions were based on a number of findings and policy considerations. Briefly, these are as follows:

- (1) The specialized audience was more concerned that both KKHI-AM and FM furnish at least one high quality program service than that KKHI-AM and FM provide diversified fare or lower quality classical music.
- (2) The audience listened in such a variety of circumstances and locations that there would not be the normally expected waste of valuable spectrum space.
- (3) The audience preferred the “continuity of programming” whereby they could move from their homes to their cars, to work or elsewhere and still receive the quality program format without interruption and wherever they happened to be.

⁵E.g., Sunbeam Television Corp. v. Federal Communication Commission, 100 U.S. App. D.C. 82, 243 F.2d 26 (1957); Melody Music Inc. v. FCC, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). Cf. United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957).

(4) FM reception, although preferred when in the proper location and with proper reception equipment, was many times not available or not preferred because of the activity or location of the listener.

(5) Offering different classical music selections on the AM and FM carrier would be of marginal utility, would be expensive, and would put a difficult financial burden on KKHI at a probable loss of quality in the musical product.

Based on this showing, Appellant believes it was entitled to the requested "exemption" and urges the Court to so hold as a matter of law.

One point must be made crystal clear. Appellant has no quarrel with the general proposition that since it is *prima facie* wasteful to use two frequencies to bring the same programming to the same general area, it is within the authority of the Commission to adopt the rule itself. Cf., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). The rule does not constitute an unlawful interference with the licensee's rights under Section 326, since the rule itself provides for an "exemption" where the public interest will be served. Appellant is attacking the application of the Rule to the facts of this case.

The Commission's basic statement of the scope of its authority for the regulation of programming is set forth in the "Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry," *supra*. The Commission concedes that there are limitations imposed upon it both by the First Amendment to the Constitution and Section 326 of the Communications Act of 1934, as amended.

The Commission's ability to involve itself at all in the programming area stems from the fact that the Act establishes a licensing system which requires that the Commission consider "public interest" factors.⁶ In the Policy

⁶ *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, Case No. 19,938, decided June 13, 1967, United States Court of Appeals for the District of Columbia Circuit.

Statement, the Commission quotes with approval a statement of Mr. Whitney North Seymour (20 Pike & Fischer R.R. at 1907):

"While the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."

This legal restraint is equally applicable where Governmental interference is "asserted in aid of free speech, as well as . . . repressive of it. The protection against abridgment of freedom of speech and press flatly forbids Governmental interference, benign or otherwise." (*Ibid.*) The Commission's Policy Statement also recognizes the very practical difficulties of attempting to assume supervision over program content; there is simply no common denominator whereby it could choose what is best for the people.

Recognizing these limitations, the Commission in its Policy Statement attempts to define the proper scope of its authority under the general "public interest, convenience and necessity" standard. First, the Commission concludes it must exercise its authority over the broadcaster's program service because programming is "of the essence of radio service."

In order to steer a safe course between the determination of the public interest on the one hand and forbidden censorship on the other, the Commission has decided to place the primary responsibility upon the licensee to decide what type of program operation is desirable. But the broadcaster cannot make this determination a frolic of his own, nor may he devote his programming to a private purpose. The Commission stated (20 R.R. at 1913):

"The broadcaster is obligated to make positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. . . .

"In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs and interests on an equitable basis. . . .

" . . . The ascertainment of the needed elements of the broadcast matter to be provided by a particular licensee for the audience he is obligated to serve remains primarily the function of the licensee. His honest and prudent judgments will be accorded great weight by the Commission. Indeed, any other course would tend to substitute the judgment of the Commission for that of the licensee."

Having established the above stated burden upon the licensee, the Commission was faced with the difficult question of how it would exercise its policing functions to review the performance. The Commission said (20 R.R. at 1915):

"To enable the Commission in its licensing functions to make the necessary public interest finding, we intend to revise Part IV of our application forms to require a statement by the applicant, whether for new facilities, renewal or modification, as to:

"(1) The measures he has taken and the effort he has made to determine the tastes, needs and desires of his community or service area, and (2) the manner in which he proposes to meet those needs and desires.

" . . . What we propose is documented program submissions prepared as a result of assiduous planning and consultation covering two main areas: First, a canvass of the listening public who receive the signal and who constitute a definite public interest figure; second, consultations with leaders in community life—public officials, educators, religious, the entertainment media, agriculture, business, labor—pro-

fessional and eleemosynary organizations, and others who bespeak the interests which make up the community.

"... by his narrative development, in his application, of the planning, consulting, shaping, revising, creating, discarding and evaluation of programming thus conceived or discussed, the licensee discharges the public interest facet of his business calling without Government dictation or supervision and permits the Commission to discharge its responsibility to the public without invasion of spheres of freedom properly denied to it. . . ."

What were the respective performances in this case under this dual responsibility? KKHI-FM stated in its renewal application (R. 59-60):

"Pursuant to our responsibilities as licensee, we have determined from surveys of public desires and personal contacts with members of the community, that continued 100% duplication of our quality music programming would best serve the interests of our listeners. As a specialized good music station—there are only a few in the country comparable—we do not try to reach the entire audience in San Francisco but within the group normally interested in our type of high quality music, there is general agreement that continued duplication is desirable."

KKHI stated that the selection of program material was uniquely its function and that such judgment required a sensitive consideration of local factors. KKHI said (R. 60):

"To achieve this, we participate in community affairs, we canvass the wishes of the listening audience served and we seek out the opinions of many leading public service, civic and cultural figures in San Francisco."⁷

One later survey (of the four taken) should be reemphasized in light of its express applicability to the duty to seek

⁷ KKHI supported this conclusion with detailed documentation. R. 79-103, 227 ff. See Summary of Facts, *supra*, pp. 6-11.

out the desires of the public (R. 56-60). In the December, 1966 survey 2000 listeners were questioned specifically whether they wanted a change from the combined AM and FM programming. 1,400 listeners responded, indicating that they used both AM and FM interchangeably depending on where they were and what signal was technically available. The express question was asked (R. 169):

“(4) Would you prefer KKHI to continue as a combined operation broadcasting the same classical music selections, symphonies, concertos, and other programs *simultaneously* on both KKHI (AM) and KKHI-FM—so that you would receive the same programming regardless of whether you were listening on your AM or your FM radio.”

Ninety-six percent answered saying they preferred the combined operation!

On the same questionnaire, the next question read:

“(5) Or would you prefer KKHI-FM to do a different type of programming at least 50% of its time—such as:

- (a) Rock and Roll Music
- (b) Show Tunes-Albums-Background
- (c) Classical-Different programs on KKHI-FM Dial from KKHI-AM
- (d) Country and Western Music
- (e) An all-talk, such as telephone interviews, sports, news, conversations, religion.”

None of these alternative formats received any substantial support: Even as to question 5(c) (whether the audience would prefer *different* classical music programs 50% of the time on FM), only 20% of those who answered this question suggested that they would prefer different classical programming on the FM.

Based upon KKHI’s overall renewal showing, it must be concluded that it made the type of “documented submissions prepared as a result of assiduous planning and consul-

tation," as expressly required by the Commission's Policy Statement and that, furthermore, the judgment of the licensee to continue duplication is a reflection of its good faith efforts to ascertain and determine the community's needs.

Since KKHI has done precisely what the Commission requires under the Policy Statement, and since Section 73.242 (c) permits continued duplication upon a substantial showing of public interest factors, it is submitted that the Commission's refusal to grant the exemption clearly runs afoul of its own Policy Statement. More importantly, the Commission intrudes upon the lawful judgment of the licensee as to what programming should be. Under Section 326, the First Amendment and the Commission's own Policy Statement, the Commission should have accepted the licensee's judgment after having satisfied itself that the licensee discharged its responsibilities to seek out the public interest in a conscientious manner.

Here, the Commission did not really concern itself with the public interest factors urged by Appellant. In fact the Commission did not even discuss KKHI's efforts to ascertain listener needs. Instead, it brushed the entire showing aside in the only paragraph dealing with the merits (Paragraph 9), saying (R. 222):

"We have mentioned the waste involved in using two broadcast frequencies to bring exactly the same intelligence to the same receiver locations; and our judgment that, in large markets where FM set circulation is now relatively high, the time has come to require the FM medium to operate to this degree as a separate service and end the waste." (Footnote omitted)

But, of course, the "waste" argument is always present; this is the only justification for the rule itself. If "exemptions" are proper, then the Commission must consider other factors involving the public interest. Since Appellant's showing was thoroughly documented, prepared as a result of "assiduous planning and consultation" and based on sub-

stantial public interest considerations, Appellant met its burden under the Commission's Policy Statement and also its burden under Section 73.242(c). The Commission as a matter of law should have granted the requested exemption.

II

The Commission's Refusal To Designate the Exemption Request for Hearing Violates Appellant's Rights to Hearing Under the Communications Act of 1934, as amended.

A. Preliminary Statement

This case involves a novel and important question regarding the need for and scope of hearing where an applicant requests a waiver of or exemption from a rule. This case is novel in that it requires a further refinement and extension of the doctrines enunciated in the cases of *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956); *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33 (1964), *rehearing denied*, 377 U.S. 974, 984 (1964), and *American Airlines v. Civil Aeronautics Board*, 123 U.S. App. D.C. 310, 359 F.2d 624, *en banc* (1966), *cert. denied*, 87 S.Ct. 73 (1966).

These cases involved the classic question of whether an agency can — by promulgating general substantive rules — effectively deny statutory hearing rights. The apparent hearing rights were denied to applicants on the one hand whose applications on their face showed a clear violation of the adopted rule, and on the other, licensees whose certificates were modified by the rule adopted.

In each case, the Court concluded that so long as an appropriate opportunity was offered to participate in the rule making proceedings, a full evidentiary hearing would not be required on the detailed application or modification, when patently in violation of the rule.

Most significantly for the instant case, in none of these three cases did the Court have before it the question as to

what would be the hearing right if the applicant requested a "waiver" of the rule, for in none of the cases was a "waiver" requested. Nor did any of the cases involve a rule, such as Section 73.242(c), which by its express terms provides for an "exemption" where the public interest would be served.

All of the cases, nevertheless, recognized the need for a waiver provision and the need for a fair procedure to consider such "waiver" requests.

The Supreme Court in the *Storer* case said:⁸

"As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing."

The same was true in the *Texaco* case, where the Court said:⁹

"Facts might conceivably be alleged sufficient on their face to provide a basis for waiver of the price-clause rules and for a hearing on the matter. . . . But no such attempt was made here . . ."

To the same effect is the *American Airlines* case, *supra*, where the appellants alleged that their "certificates" were being modified by the mere adoption of the rule in question; and that such modification could not be effective without affording them a statutory hearing. Since in none of these cases was a waiver requested, the Court had no occasion to formulate any rules regarding the adequacy of the request, nor to focus upon the circumstances under which a hearing would be necessary.

Thus, the instant case presents to this Court the extremely important question of determining what circumstances jus-

⁸ 351 U.S. at 205.

⁹ 377 U.S. at 40-41.

tify the holding of a hearing on a "waiver" or "exemption" request. It also presents the question of defining the nature of that hearing. As agencies tend to make greater use of their rule making authority to establish broad standards of conduct — a result generally thought desirable by commentators¹⁰ — the need to establish satisfactory standards for consideration of waiver requests becomes most critical.

In the instant case, appellant was unable to persuade the Commission to grant the "exemption" request without hearing. Appellant has urged in Section I that as a matter of law this was error. But in any event, it is submitted that Appellant is entitled to a hearing. The consideration and denial of the "exemption" request constituted "agency process for the formulation of an order" and hence under the Administrative Procedure Act was an "adjudication."¹¹ Under the Communications Act of 1934, as amended, the Commission was compelled to designate the request for hearing, if it could not otherwise grant the "exemption" request.

¶ The Denial of the Exemption Request Without Hearing Deprives Appellant of Its Hearing Rights Under Section 309(e) of the Communications Act of 1934, as Amended, and Section 1.110 of the Commission's Rules.

Pursuant to Section 308 and 309(a) of the Communications Act of 1934, as amended, Appellant filed its renewal applications for both KKHI-AM and FM on August 20, 1965. (R. 59, 227) The application form (FCC Form 303, adopted October, 1963) required in Section IV a "Statement of Program Service of Broadcast Applicant." This Section IV requirement was quite extensive. In the introductory head note, as a notice to all applicants, Section IV states:

¹⁰ Shapiro, "The Choice of Rule Making or Adjudication in the Development of Administrative Policy," 78 Harv. L. Rev. 921, 922 (1965).

¹¹ Formerly Section 2(d) of APA. Now codified by Public Law 89-554, adopted September 6, 1966, 80 Stat. 382, 5 U.S.C. Sec. 551(7).

"The replies to the following questions constitute a representation of programming policy upon which the Commission will rely in considering the application. It is not expected that licensee will or can adhere inflexibly in day-to-day operation to the representation here made. However, since such representation will constitute, in part, the basis upon which the Commission acts on the application, time and care should be devoted to the preparation of the replies so that they will reflect accurately applicant's responsible judgment of his proposed programming policy."

There followed twelve separate questions dealing with every aspect of programming policy. In both the AM and FM applications Appellant set forth in detail its programming proposals. These have been described *supra*, pages 8-9, and need not be repeated. This renewal showing was followed up by an extensive amendment in October of 1965 reporting the results of the survey sent to some 2,000 listeners which indicated that there was universal approval of the continuance of KKHI-AM and FM as a combined operation. (R. 79-103)

The Commission on November 5, 1965 granted both the AM and the FM renewal. However, it refused to grant the "exemption" request made in the renewal application, instead stating that the renewal grants were "without prejudice to whatever action the Commission may take on your pending request for waiver of the requirement of your compliance with Section 73.242 of the rules." (R. 104)

Clearly, this was not a grant of the renewal as requested by KKHI-FM. Were programming proposals a minor factor in the renewal process, it might be argued that the grant of the renewal subject to later action on the programming proposal was not critical. However, as the Commission's own Programming Policy states:¹²

¹²Commission *En Banc* Programming Inquiry, *supra*, n. 4, at 1910.

"It is generally recognized that programming is of the essence of radio service."

Furthermore, under Section 307(b) of the Communications Act "appropriate attention to local live programming is required." (*Ibid.*) Thus, it must be conceded that to grant the renewal without approval of the programming proposals for KKHI-FM was not, in fact, a grant.

Section 309(e) of the Communications Act of 1934, as amended, provides¹³ as follows:

"If, in the case of any application to which subsection (a) of this section applies (e.g. renewal applications), a substantial and material question of fact is presented or the Commission for any reason is unable to make the findings specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the application and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally . . ."

Since Appellant had expressly requested an exemption under Section 73.242(c), the Commission was required to make the judgment called for by Section 309(e); namely, either grant the proposal as in the public interest or if "unable to make the finding," "formally designate the application for hearing."

KKHI-FM decided to refuse to accept the renewal on the terms granted. It relied for this decision upon the provisions of Section 1.110 of the Commission's Rules which states as follows:¹⁴

"Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested . . . the action

¹³ 48 Stat. 1085, 74 Stat. 889, 78 Stat. 193-194, 47 U.S.C. 309(e).

¹⁴ 47 CFR 1.110.

of the Commission shall be considered as a grant of such application unless the applicant shall, within thirty days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing."

By letter dated November 30, 1965, Appellant rejected the grant as made and requested reconsideration and grant without hearing or, in the alternative, requested that (R. 108):

"If the Commission is unable to grant the exemption request, then a hearing is demanded on that request, pursuant to the provisions of Section 73.242(c) and 1.110 of the Commission's Rules."

This particular request of Appellant's was never acted upon by the Commission until the Order now under review. In the present Order the Commission deals most summarily with the right to hearing. In paragraph 10, it states (R. 223):

"Nor do we find merit in the contention that KKHI — by 'rejecting' grant of its renewal application without grant of exemption and invoking Section 1.110 — is entitled to an evidentiary hearing on the question whether continued duplication would serve the public interest. This amounts to a contention that a licensee, by requesting waiver of *any* Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance. As we repeatedly said, not every request for waiver warrants a hearing."

This completely fails to come to grips with KKHI's procedural argument. In the first place, this is not just "any rule." This is a rule dealing with programming — with the

entire programming operation of KKHI-FM - which goes to the very essence of the broadcast service. In the second place, the duplication rule 73.242(c) itself provides for "exemptions" where the public interest would be served. Third, the request for exemption was bottomed on substantial and material questions affected with the public interest.

The Commission concluded on the merits that the showings made "do not constitute the 'substantial showing' specified in Section 73.242(c)" (R. 223). The Commission then stated "A hearing is neither required nor appropriate" (R. 223). It is submitted that the conclusion on the merits that the showing was not sufficiently *substantial* involves different considerations than does a conclusion that the "exemption" showing is so *insubstantial* as to not even warrant a hearing. The two questions, it is submitted, are not synonymous. The Commission clearly erred by treating them the same.

If the Commission is persuaded by the compelling nature of the showing that it should grant the exemption, then no hearing is necessary; conversely, if the showing made is frivolous or patently defective, the Commission could deny the waiver request out of hand. But where a good faith, substantial and material showing is made that public interest factors support continued duplication, then it is the Commission's duty under Section 309(e) of the Act to set the renewal application for hearing if it cannot grant the "exemption."

Obviously, the proposed test suggested above does not apply equally to all types of rules. Appellant would concede that there are rules which, by their nature, would justify a denial of a waiver request out of hand except under most extraordinary circumstances. These may be grouped in the following manner.

(1) Requests for facilities or frequencies no longer available

If an application is filed for the use of a frequency which is simply no longer available a waiver request need not be designated for hearing.¹⁵

(2) Requests involving Rules which embody fundamental policy considerations

Where the rule reflects such a basic policy consideration as to require adherence to a fundamental standard — such as the clear channel rules, 21 Pike & Fischer R.R. 1801 (1961) — the uniqueness of a particular waiver request would simply have to give way to the broader policy considerations. To favorably entertain waiver requests would erode the basic policy judgment and effectively nullify the rule.

(3) Requests involving Rules which have established a clear and certain quantitative standard

Similarly, some rules, as in the case of *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956), represent a clear decision that a certain quantitative limit is as far as the Commission will go or as much as the Commission will permit. It does little good to request a waiver on the grounds that that limit is too low or too high. Indeed, like a speed limit, the limit itself represents a compromise. It must be adhered to if there is to be a rule at all.

Thus, in each of these situations, the Commission could appropriately demand a substantially higher threshhold showing before granting the waiver or ordering a hearing. But such situations are simply not applicable to the instant rule or the instant facts.

¹⁵ E.g., *Bendix Aviation Corp. v. Federal Communications Commission*, 106 U.S. App. D.C. 304, 272 F.2d 533 (1959), *cert. denied*, 361 U.S. 965.

The instant rule is more comparable to the "10% rule," which is very familiar to this Court.¹⁶ A typical case is *Interstate Broadcasting Company v. Federal Communications Commission*, 105 U.S. App. D.C. 224, 265 F.2d 598 (1959). The "10% rule" as then promulgated appeared to forbid the grant of an application — with certain clear exceptions — where the interference received by the applicant's proposal affected 10% or more of the population within that station's service area. Nevertheless, in case after case, applications which on their face violated this rule were accepted for filing and designated for hearing on the issue of whether or not the rule should be waived. As the Court stated in the *Interstate* case, quoting an earlier case (105 U.S. App. D.C. at 228, 265 F.2d at 602):

"As for the ten percent rule itself, the Commission has long recognized that it specifies only a norm, not a hard and fast rule. Both in authorizing and refusing to authorize departure from the ten percent standard, the Commission has frequently stated that the governing criterion is the public interest."

Other rules of this type are common: A standard of conduct is established, subject either expressly in the rule or by interpretation to exemptions or waivers where the public interest would be served.¹⁷ In all these cases, hearings are granted where there is an apparent violation of the rule, but applicant seeks to justify the waiver on public interest grounds. Concededly, if the showing made is frivolous the waiver request can be denied out of hand; but where the

¹⁶ Formerly Section 73.28(c) (47 CFR 3.28(c) (1958)). E.g., *Williams v. Federal Communications Commission*, 120 U.S. App. D.C. 385, 347 F.2d 479 (1965); *Sunshine State Broadcasting Co., Inc. v. Federal Communications Commission*, 114 U.S. App. D.C. 271, 314 F.2d 276 (1963).

¹⁷ E.g., 73.35(b) (multiple ownership), 47 CFR 73.35(b); 73.30(b) (station location), 47 CFR 73.30(b); 73.188(b) (location of transmitters), 47 CFR 73.188(b).

waiver request presents a substantial showing in good faith the Commission orders the hearing.

Such should be the situation here. Section 73.242(c) expressly provides for exemptions and Appellant filed its "exemption" request as an integral part of its renewal application. As will be developed in connection with Section II C, the policies urged by Appellant and the factual support for these policies are precisely the matters which need exploration in an evidentiary hearing. In the Report and Order adopting Section 73.242(c) it was recognized that exemptions would be entertained where the public interest would be served by allowing unlimited program duplication.¹⁸ Obviously, the general concern over waste in the use of two frequencies to broadcast the same program material is irrelevant to the hearing on the exemption request. Other public interest considerations must be developed and considered by the Commission.

KKHI-FM tailor-made its renewal showing to fit the unique circumstances applicable to it in the San Francisco area. It would be the purpose of a hearing to spell out more fully the public interest factors, the needs and desires of the listening audience, the factual information concerning other radio services available in the Bay area and the operating and economic circumstances peculiar to KKHI-FM which would warrant an exemption. To deny KKHI-FM this opportunity is a denial of its hearing rights under Section 309 (e).¹⁹

¹⁸ 2 Pike & Fischer R.R.2d 1658, 1678 (1964).

¹⁹ If the Court concludes Appellant has not preserved its rights to protest the renewal grant by its letter of November 30, 1965, rejecting the grant and demanding a hearing (R. 106-108), Appellant urges that the denial of its Exemption Request constitutes an unlawful modification of its license without hearing, contrary to Section 316(a) of the Communications Act of 1934, as amended, 66 Stat. 717, 47 U.S.C. 316(a). The denial of the exemption in the middle of the license term materially changed the operating proposals of Appellant, and as such constituted a modification of its license.

C. *Because of the Nature of the Issue Involved and the Arguments Advanced in the "Exemption Request," the Refusal To Grant a Full Evidentiary Hearing Was Arbitrary, Capricious and Contrary to Law.*

Aside from Appellant's express rights under Section 309 (e), it has the right not to be subject to governmental actions which are arbitrary, capricious and contrary to law.²⁰ Government action is arbitrary where a hearing is denied on a "waiver request" which, because of the merits involved, can only be fairly determined by a full evidentiary hearing.²¹

To determine whether this independent need for hearing arises, the nature of the particular rule must again be considered as well as the nature of the facts upon which a request for waiver of the rule is based.

The first factor to consider is the generality of the Rule itself. Here the rule established a general standard of performance, but subject to "exemption" upon a substantial showing that the public interest would otherwise be served. This is a broadly phrased "exemption". Because of the broad language of a rule such as this, hearings are required to determine whether a specific circumstance is encompassed within the conclusion that "continued program duplication would better serve the public interest." Broad rules are promulgated in rule makings with the result, intended or otherwise, that the rule must be applied by adjudication. A mere consideration of pleadings does not result in the type of inquiry called for by a rule couched in general terms or which contains a broad exception.

²⁰ Section 706(2), Public Law 89-554; formerly Section 10(c) of Administrative Procedure Act. 80 Stat. 393, 5 U.S.C. § 706(2)(A). Adopted Sept. 6, 1966.

²¹ Londoner v. Denver, 210 U.S. 373 (1908); Morgan v. United States, 298 U.S. 468 (1936).

Another critical inquiry in determining whether or not a hearing is appropriate is the nature of the facts and arguments which are at issue. Professor Kenneth Culp Davis has dealt at some length with this distinction in his treatise on Administrative Law. He defines facts as of two kinds, "Adjudicative" and "Legislative."²² He states:

"Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the question of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."

The "legislative facts" regarding the improving conditions in the FM industry, the elements of waste in the use of frequencies, and the general advantages of bringing a greater diversity of program services were considered by the Commission at the time of the adoption of the rule itself. However, the detailed, factual development of the circumstances which would support an exemption for one station in one market are "adjudicative" in nature and under Professor Davis's analysis justify an evidentiary hearing.

A final inquiry as to whether or not an evidentiary hearing is appropriate is whether the facts are in dispute. In the instant case, although the Commission has been careful not to dispute clearly the factual allegations of KKHI, there are several instances which show that the Commission refused to give full force and effect to Appellant's arguments, probably because of a seriously inadequate record.

For example, Appellant attempted to develop the uniqueness of its classical programming, a service not otherwise

²² Davis, *Administrative Law Treatise*, Sec. 7.02 (1st Ed. 1958). The distinction is quoted with approval in the *American Airlines* case, 123 U.S. App. D.C. at 319, 359 F.2d at 633.

available in the market. In the Commission's Memorandum Opinion and Order (Footnote 5 to Paragraph 9, R. 223), the Commission deprecated the "uniqueness" of KKHI-FM's programming, stating as a fact that at least one other San Francisco station had been granted an exemption because of its "classical format" and stating as a fact "there are other good music stations in San Francisco." KKHI-FM simply disagrees with these factual conclusions. Although there may be other stations which call themselves "good music" stations, they do not perform the type of unique service in the classical music field which KKHI-FM performs, nor are they recognized as "classical" by the sophisticated audience in San Francisco. Here, then, is a disputed point which KKHI-FM ought to have the opportunity to develop.

Second, KKHI-FM argued that the normal waste inherent in AM-FM duplication was not present because at many locations only one signal or the other could be received, because many times the listener has only one type of receiver, and because the audience, itself, preferred the flexibility of receiving the specialized programming on both stations. Again, the Commission brushes this aside by stating that "KKHI does not make a substantial claim of coverage differences." (Footnote 4 to Paragraph 9, R. 222). KKHI-FM does claim substantial coverage differences and it would be the purpose of the hearing to show that the supposed waste of frequencies generally applicable is not present here.

Third, Appellant had emphasized the desire of its listeners for "continuity" of listening in the home, in autos, on the beach, on transistors and elsewhere. This argument was disposed of by reference to an earlier Memorandum Opinion and Order, issued in March, which stated that this was simply not "a significant consideration." (7 Pike and Fischer, R.R.2d 99, 112-113). Whether or not in a particular case this is significant turns upon the desires and interests of the audience. Where, as here, hundreds of individual comments were received by KKHI-FM supporting this concept of "continuity" of listenership, and supporting the concept of duplica-

tion, it is submitted that the consideration indeed becomes "significant."

Fourth, Appellant urged that its audience was a most unusual and loyal audience, and that it desired one high quality programming service more than it desired diversified service. The Commission deals with this argument in Paragraph 9 by stating:

"We recognize what appears to be the high quality of KKHI's musical programming and that it is liked by its listeners, but there appears no reason why it cannot continue to be available on both services when the stations comply with the rule." (R. 222)

In effect, this is a total rejection of KKHI's claim that its sophisticated audience prefers one excellent service. This also fails to take into account the argument — which would be further developed in a hearing — that the production of one high quality program service requires substantial time, effort and expense; that to present two programming services of this unique type may well result, because of economics, in a lower quality product or, indeed, may require a shift to a totally different format; and finally, that the tremendous financial drain would not be offset by the marginal benefit of receiving two services.

In each of the above circumstances there were factual allegations and arguments which the Commission failed to accept. By denying a hearing, these disputed or questioned facts could not be developed on the record. These are precisely the types of issues which warrant a full evidentiary hearing.

There are very few cases directly in point; but case law is consistent with Appellant's position. The recent case of *National Labor Relations Board v. Joclin Manufacturing Co.*, 314 F.2d 627 (2d Cir. 1963) is in point. The NLRB, as a matter of practice (not statutory right), awards a hearing in challenged labor certification proceedings where the factual issues raised are "substantial and material". In the particular case, the Board refused to grant a hearing as a

matter of its discretion; the Court of Appeals reversed, finding that the issues were "substantial and material", and hence, under the regulations, a hearing was in order.

Another consistent decision is *Interstate Broadcasting Company v. Federal Communications Commission*, 116 U.S. App. D.C. 327, 323 F.2d 797 (1963). In this case, Station WQXR argued that it was entitled to protection from interference, even though the alleged "interference" was outside the "normally protected contour." The Court held that the establishment of a "normally protected contour" was a "legislative judgment" and hence was reasonable. Thus the rule could be applied without affording a "full hearing" to an objecting party. Nevertheless, it found that WQXR had alleged "special circumstances" and that the Commission "did not deal adequately with this contention." The Court remanded the case for further consideration, instructing the Commission that if WQXR's "specific factual allegations, construed in the light of the affidavits, testimony and exhibits, . . . are sufficient to preclude grant of either application," the Commission must offer WQXR an opportunity to prove the allegations. (323 F.2d at 802).

In both of these cases, it is submitted, the Courts were attempting to determine whether substantial and material questions of fact or policy were involved, which would indicate the necessity for a hearing. This Court also has had many occasions to deal with the "protest" provisions of Section 309(d)(1)(2).²³ This section provides that if upon the filing of a "petition to deny" an application, a "substantial and material question of fact is presented" or if the Commission is unable to find that the grant of the pending application would serve the public interest, it is required to designate the application for hearing. The Court has construed this requirement many times; wherever the "issues presented were substantial" or wherever the factual allega-

²³Section 309(d)(1)(2), 74 Stat. 889, 47 U.S.C. 309(d). Formerly Section 309(c), 66 Stat. 715, 68 Stat. 35, 70 Stat. 3.

tions required detailed inquiry and scrutiny, the Court ordered a hearing.²⁴

The case of *American Airlines, Inc. v. Civil Aeronautics Board, supra*, was much concerned with the question of whether a hearing would be useful. Judge Leventhal's opinion concluded that the issues centered on "legislative" rather than "adjudicative" facts and concluded that an evidentiary hearing was unnecessary.²⁵

In the instant case, Appellant has expressly requested an "exemption" from the general rule and has described in detail the type of facts and arguments it wishes to develop. A full evidentiary hearing is necessary for the proper development of the public interest factors under Section 73.242(c).

²⁴ *E.g.*, Wometco Enterprises, Inc. v. Federal Communications Commission, 114 U.S. App. D.C. 261, 314 F.2d 266 (1963); *Citizens TV Protest Committee v. Federal Communications Commission*, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965); *Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 225 F.2d 511 (1955).

²⁵ 123 U.S. App. D.C. at 319, 359 F.2d at 633.

CONCLUSION

In light of the foregoing, it is respectfully submitted that this Honorable Court should judge invalid and set aside the Commission's Memorandum Opinion and Order released April 27, 1967. It should order the Commission, as a matter of law, to grant the "Exemption Request" of KKHI-FM, or in the alternative, it should order the Commission to grant Appellant a full evidentiary hearing on the "Exemption Request."

Respectfully submitted,

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Dated: August 7, 1967

ANNEX

STATUTES INVOLVED

*COMMUNICATIONS ACT OF 1934,
AS AMENDED.*

Act of June 19, 1934, c. 652, 48 Stat. 1064, 47 U.S.C. 151 et seq.

Section 309(a)(74 Stat. 889) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(e)(78 Stat. 193, 194) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any

hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 316 (66 Stat. 717) (a) Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this chapter or of any treaty ratified by the United States will be more fully complied with. No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor, and shall have been given reasonable opportunity, in no event less than thirty days, to show cause by public hearing, if requested, why such order of modification should not issue: *Provided*, That where safety of life or property is involved, the Commission may by order provide for a shorter period of notice.

(b) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Section 326 (62 Stat. 862) Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

*RULES AND REGULATIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION.*

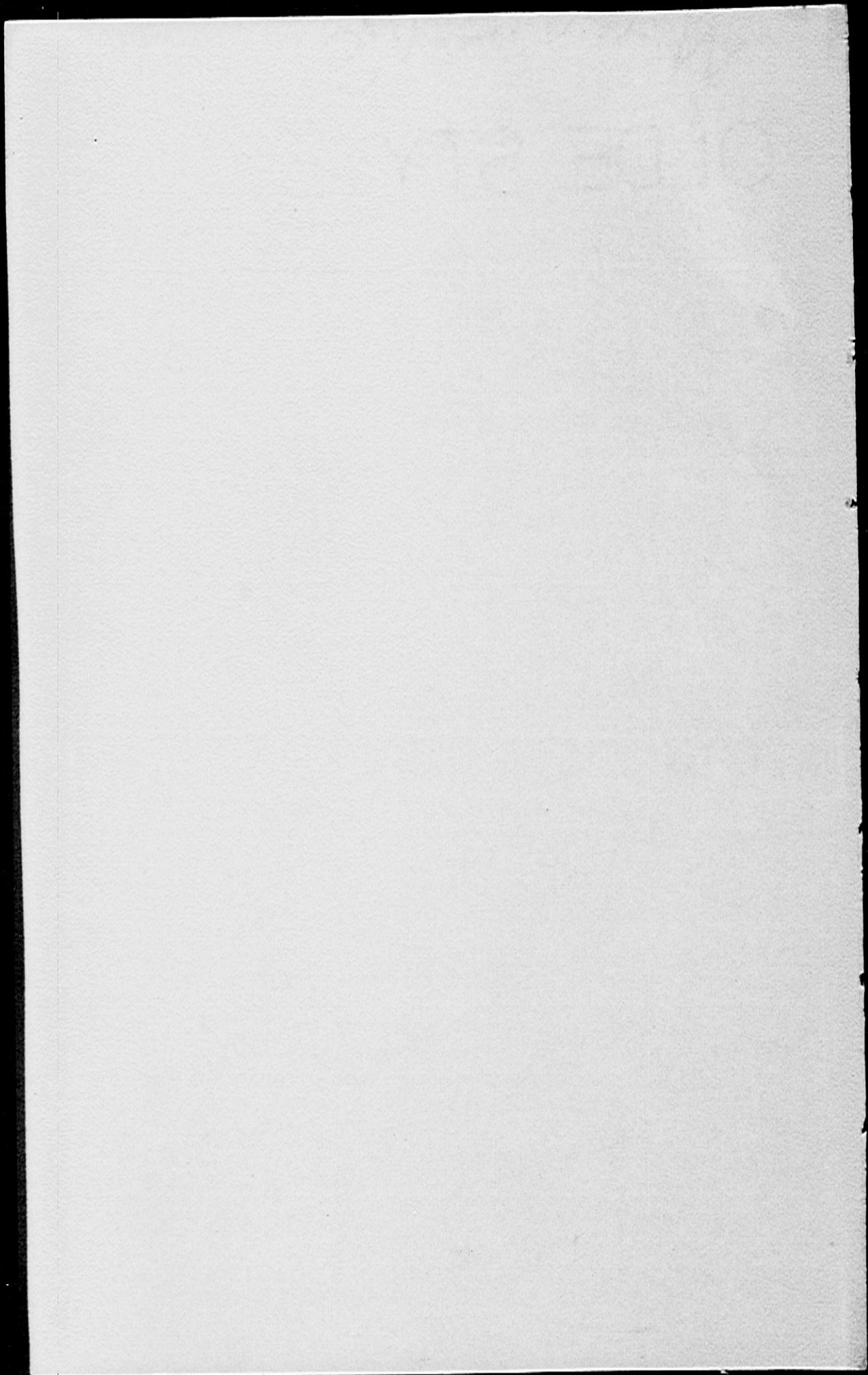
47 C.F.R. 0.1 et seq.

Section 1.110 Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, or subject to any interference that may result to a station if designated application or applications are subsequently granted, the action of the Commission shall be considered as a grant of such application unless the applicant shall, within 30 days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.

Section 73.242(a) After October 15, 1965, licensees of FM stations in cities of over 100,000 population (as listed in the latest regular U.S. Census Reports) shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area. For the purposes of this paragraph, duplication is defined to mean simultaneous broadcasting of a particular program over both the AM and FM station or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station.

(b) Compliance with the non-duplication requirement shall be evidenced by such showing in connection with renewal applications as the Commission may require.

(c) Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of paragraph (a) of this section. Requests for such exemption must be submitted to the Commission, accompanied by supporting data, at least 6 months prior to the time the non-duplication requirement of paragraph (a) of this section is to become effective as to a particular station. Such exemption, if granted, will ordinarily run to the end of the station's current license period, or if granted near the end of the license period, for some other reasonable period not to exceed 3 years.



BRIEF FOR APPELLEE-RESPONDENTS

United States Court of Appeals

for the District of Columbia Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED SEP 21 1967

No. 21,017

Nathan J. Paulson
CLERK

BUCKLEY-JAEGER BROADCASTING CORPORATION OF CALIFORNIA,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

APPEAL FROM A MEMORANDUM OPINION AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

No. 21,018

BUCKLEY-JAEGER BROADCASTING CORPORATION OF CALIFORNIA,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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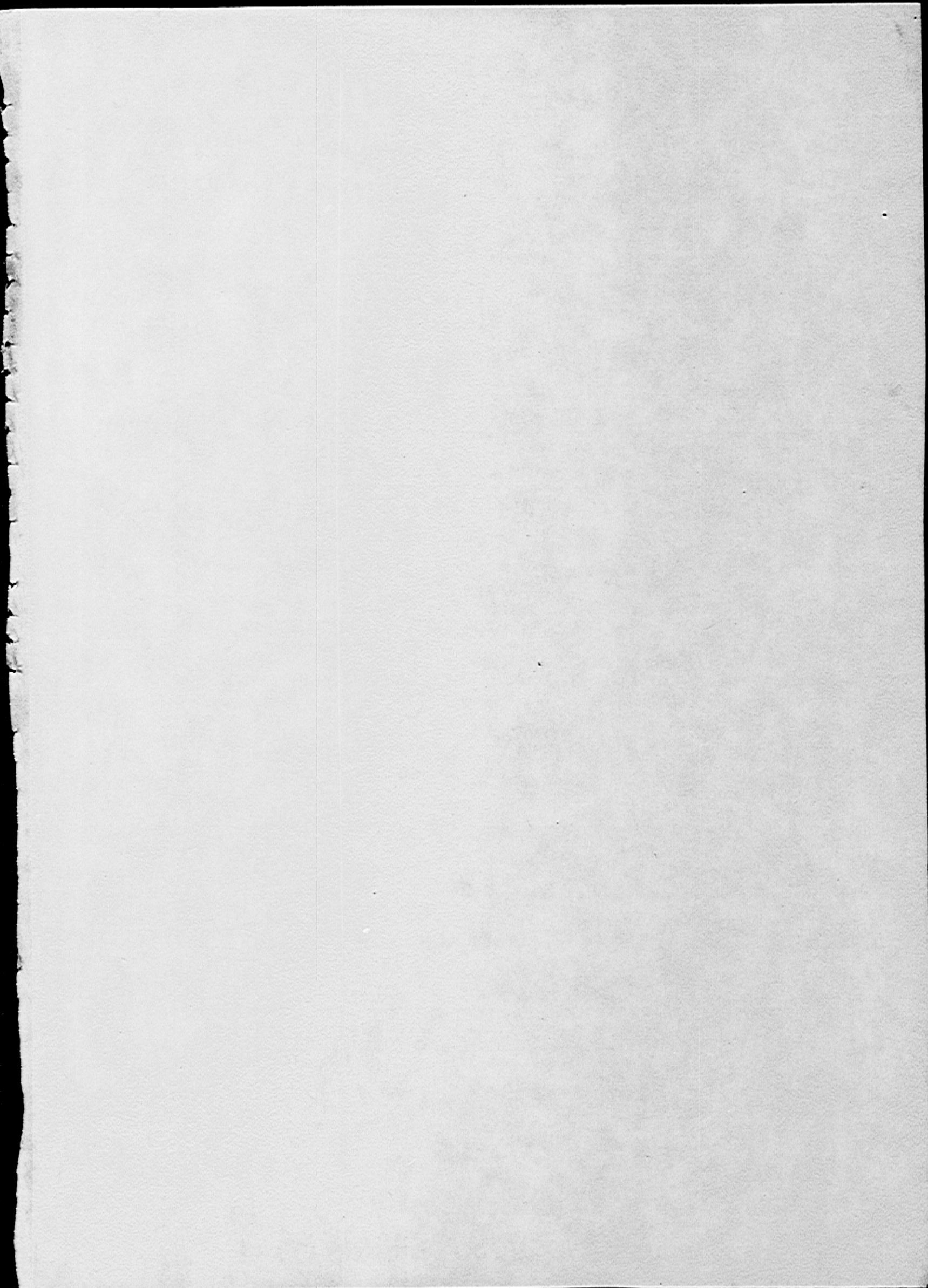
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STATEMENT OF QUESTIONS PRESENTED

The questions presented are correctly set forth on the first page of appellant's brief.

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IN THE UNITED STATES COURT OF APPEALS
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BUCKLEY-JAEGER BROADCASTING CORPORATION OF CALIFORNIA,
Appellant,

v.

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APPEAL FROM A MEMORANDUM OPINION AND ORDER
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Respondents.

PETITION FOR REVIEW OF ORDER OF THE
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BRIEF FOR APPELLEE-RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Case No. 21,017 is filed under section 402(b) of the
Communications Act of 1934, as amended, 47 U.S.C. section 402(b),
from a Memorandum Opinion and Order of the Federal Communications
Commission (R. 219-225) released April 27, 1967, which denied

appellant's "Request for Exemption" from section 73.242(a) of the Commission's rules, 47 CFR section 73.242(a), and which denied appellant's request for a hearing. Appellant also attacks a Commission ruling (R. 226), issued simultaneously in a letter to appellant, granting a temporary exemption from the rule until August 1, 1967, but declining to issue a permanent exemption.

Appeal No. 21,018 is filed under section 402(a) of the Act, 47 U.S.C. section 402(a). The jurisdiction of this Court rests on sections 2342 of the Judicial Review Act, 28 U.S.C. 2342. Venue in this judicial circuit is based on 28 U.S.C. 2343. The Notice of Appeal in No. 21,017 and the Petition for Review in No. 21,018 seek review of the same subject matter, and by order of July 10, 1967, the cases were consolidated.

The cases arise out of the unsuccessful attempt of Buckley-Jaeger Broadcasting Co., licensee of KKHI, AM and FM, in San Francisco, California, to secure an exemption from the Commission's newly promulgated rule requiring licensees operating AM and FM stations in the same local area in cities of 100,000 or more population to provide independent (nonduplicated) programming ^{1/} at least 50% of the average broadcast week on their FM outlets. Appellant does not challenge the reasonableness of the rule or the Commission's authority to adopt it. Its quarrel is only with the

1/ The full text of the rule is reproduced in the Appendix.

Commission's refusal to grant an exemption to KKHI. However, so that the reasons underlying the Commission's denial of the KKHI request may be fully appreciated by the Court, a brief statement of the considerations leading to the adoption of the rule is set forth in the following paragraphs.

1. The Rulemaking Proceeding

In the early 1940's when FM broadcasting began, stations operated on frequencies in the 42-50 mc band. At that time, the Commission expected that FM would develop into a broadcast service independent of and parallel with AM broadcasting. By regulation each FM station associated with an AM operation was required to devote at least one hour each day prior to 6:00 p.m. and one hour each evening to programming which would not duplicate the existing AM offering. Notice of Proposed Rule Making in Docket No. 15084, 25 Pike & Fischer, R.R. 1615, 1621 (1963). Subsequently, in 1945, the FM service was transferred to its present position in the spectrum, 88-105 mc, and by this time the Commission's expectations for FM broadcasting had changed significantly. Thus, instead of the supplemental service originally envisioned, it was anticipated that FM would, in time, replace most existing AM services. For this reason the Commission declined to impose rules prohibiting complete duplication of program service on new FM stations owned by AM licensees.

It gradually became clear, however, that FM would not develop in this way. The post war demand for new AM stations greatly exceeded expectations, and later television expanded rapidly and overshadowed the aural services. As a result, FM fell into a period of decline, and during the 1950's the Commission's greatest concern for FM was to prevent the collapse of the service. Few obligations were imposed on FM licensees, and AM/FM duplication was permitted to continue. Id. at 1621-2.

By 1963, the situation had altered again. Although FM broadcasting was far less popular and financially successful than AM, it was constantly growing in importance and gave promise of independent viability. Accordingly, in 1963 the Commission issued a Notice of Proposed Rule Making, in which it observed:

the time has come to move significantly toward the day when AM and FM stations can be regarded as component parts of a total aural service. We believe that the ultimate role of FM broadcasting is to supplement the aural service provided by AM stations and that, eventually, there must be an elimination of FM stations which are no more than adjuncts to AM facilities in the same community. Owing to the differing technical characteristics of AM and FM and to the separate historical development of the two services, each is able to accomplish certain tasks better than the other. It is our hope that each of the services can be developed to its maximum potential within an integrated system, and that such an integrated system will represent the best possible utilization of the frequencies allotted for aural broadcast stations. 2/
(Id. at 1622)

2/ In brief, FM is markedly superior to AM in the lack of interference and static that occurs within a station's primary service area. FM is also able to provide high fidelity musical transmission
(cont'd)

The Commission then turned to the program duplication practices being followed by most commonly owned AM-FM facilities under which the FM station was ordinarily operated as a mere adjunct of the AM facility:

It has never been seriously contended that the use of an FM facility to duplicate programs broadcast by an AM station in the same community represents an efficient use of the FM frequency. At best, AM-FM program duplication has been regarded as a temporary expedient - originally as a means of bringing about a changeover from AM to FM and, more recently, as a stopgap measure to avoid the collapse of the FM service. . . .

We now feel that this interim policy concerning FM has been of more limited value than expected and, with the demand for FM facilities increasing rapidly, we believe it is appropriate to consider a gradual change in our policy regarding duplicated AM-FM programming. It is still true that most independent FM stations do not report profitable operations. We believe, however, that the prospects of profitable

2/ (cont'd) to a degree impossible with present AM facilities. The recent introduction of multiplex stereophonic (multi channel per station) broadcasting over FM stations has opened new dimensions in high fidelity musical broadcasting. FM transmission also differs from AM in that the former does not involve any of the nighttime skywave difficulties which are important in allocating AM stations. In fact, the entire FM allocation procedure is radically different from AM in that FM allocation is governed by a table of mileage separations which makes possible a limited number of omnidirectional stations rather than an extremely large number of stations with limited, directionalized service area, as is currently true of the largely uncontrolled, ad hoc AM assignment system.

However, AM also offers some unique advantages. AM receivers are at present far more numerous than FM sets, particularly in automobiles. The nighttime skywave propagation characteristics of AM, which create great difficulties in the assignment of multiple stations on a single channel, also make possible clear channel nighttime operations rendering useful service over vast rural areas which are otherwise unserved. See Notice of Proposed Rule Making, supra, at 1623.

independent FM operation may be improved if these stations are not forced to compete for advertising revenues with AM-FM duplicators giving away FM advertising free with AM time sales. Moreover, we have considerable doubt that AM-FM duplicators are a substantial force acting to put FM sets in the home or automobile. With certain localized exceptions, it does not appear reasonable to assume that significant numbers of people buy FM sets merely to hear what they can receive, quite adequately, on their AM radios. These factors, combined with our great concern over the frequency wastage represented by program duplication in areas where no more vacant FM channels remain, have caused us to reach the tentative conclusion that total AM-FM duplication is no longer a force acting to promote FM but is, to the contrary, a practice which, in many areas, will retard the growth of an efficient and viable service. (Footnotes omitted.) (25 Pike & Fischer, R.R. at 1624).

Accordingly, the Commission proposed the adoption of a rule providing in substance that FM licensees may duplicate no more than 50% of the programs broadcast over any co-owned AM station in the area.

Upon consideration of all the comments received, the Commission adopted the rule substantially as proposed. Referring in particular to the continuation of program duplication in large metropolitan areas where nearly all available AM and FM channels are occupied, the Commission stated: "Our recent experience has demonstrated that the number of applicants willing to propose independent FM operation in cities of this size is greater than the number of channels available. In these circumstances -- with a surfeit of potential applicants and a growing scarcity of opportunities

to enter the field of broadcasting -- it appears unreasonable to allow one licensee to continue to use two channels in the same community for one program." AM Station Assignment Standards, 2 Pike & Fischer, R.R. 2d 1658, 1676 (1964).

For purposes of the rule, duplication means simultaneous AM and FM broadcast, or FM broadcast within 24 hours either before or after the AM broadcast. The rule exempts from the computation of the 50% requirement simultaneous broadcasts of special events of national or regional importance, such as space launchings, presidential inaugurations, or election returns. Id. at 1677. The rule also provides that exemptions may be requested:

(c) Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from [the rule]. (73.242(c), 47 CFR 73.242(c)).

2. The Present Proceeding

On February 8, 1965, Buckley-Jaeger Broadcasting Corp. of California (hereafter KKHI) filed a "Request for Exemption Pursuant to Section 73.242(c)" (R. 1-24). KKHI requested an exemption for the period August 1, 1965 (the effective date of the rule) through December 1, 1965, the remaining period of the then current KKHI-FM license.^{3/} It also requested waiver for the full three year license term commencing December 1, 1965. In support of its contention

^{3/} This temporary exemption was granted, and subsequent extensions have been granted. On August 8, 1967, the Commission extended the compliance date until 30 days after decision of the instant appeals. FCC 67-882. Accordingly, KKHI has never been and is not now, in violation of the rule, although it continues to duplicate 100%.

that continuation of its 100% duplication would better serve the public interest than compliance with the Commission's rule, KKHI made a number of arguments. In essence, KKHI contended that its AM/FM duplication of classical music is the only fulltime such operation in the area; that KKHI brings to the area live broadcasts of many Bay area cultural events (R. 10-12); and that on the basis of surveys taken by the station its listeners do not favor any modification of the present arrangement. A continuation of the duplication is especially important, KKHI alleged, because the audience is not "divisible"; to a large degree, listeners tune to the same program on both AM and FM, switching from one to another as they move about the home or from home to car. Thus, 46% of those responding to the first survey indicated that they listened to KKHI both on AM and FM, and 55% indicated they listened in both home and car.

(R. 5) KKHI also alleged that introduction of a non-classical format would be disruptive and would of necessity duplicate some other station's format in the San Francisco area, already served by some 57 aural broadcast stations, and that continuation of the classical music format on both stations but with different selections, would be "shockingly wasteful" and also disruptive to the audience's habits. (R. 7-9)

KKHI indicated that the cost of programming FM independently of AM would be \$23,000 for new studios, space and equipment, and approximately \$67,000 for the first year for additional staff. (R. 14-16)

KKHI also contended that it would lose its audience, and would find competition for FM advertising extremely difficult. (R. 19-20)

On June 28, 1965, KKHI filed a letter with the Commission (R. 25-37) transmitting the results of a second survey taken by the licensee. The results of this survey, according to KKHI, strengthened the survey showing made in the Exemption Request.

^{4/} On August 20, 1965, KKHI filed its AM and FM renewal applications. Exhibit No. 13 to that application (R. 59-78) was a request for exemption from the duplication rule. KKHI repeated in substance the arguments made in the first Exemption Request; and also argued that the Commission had no legal authority "under general rule making activity to force KKHI-FM arbitrarily to program separately 50% of our broadcast day. The selection of program material is uniquely a function of licensee judgment." (R. 60) KKHI requested a hearing on the exemption request if the Commission was unable to grant the request on the pleadings.

The FM renewal was granted by the Commission on November 5, 1965 (R. 104-105) "without prejudice to whatever action the Commission may take on your pending request for waiver of [the non-duplication rule.]" (R. 106) KKHI protested the FM license renewal without a

^{4/} On October 20, 1965, the FM renewal application was amended with a more extensive survey of the KKHI audience. The results were similar to those of earlier surveys. (R. 79-103).

grant of the exemption request or a hearing thereon, arguing that section 309(e) of the Communications Act, 47 U.S.C. section 309(e), and section 1.110 of the Commission's rules, 47 CFR section 1.110,
^{5/} concerning partial grants, entitled KKHI to a hearing on the exemption request and that the Commission's action amounted to denial of the renewal application as filed.

In a Memorandum Opinion and Order released March 15, 1966 (R. 109-150), the Commission disposed, in various ways, of the 115 exemption requests which were then pending. ^{6/} The Commission found that KKHI had made a sufficient showing of economic hardship to justify granting a further extension until April 1, 1967, but declined to rule at that time on the other contentions of KKHI. However, in dealing with the broad issues raised by many of the waiver requests, the Commission made some observations to which it subsequently referred in denying the KKHI request on the merits. The Commission observed that the nonduplication rule affects only 50% of the FM broadcast week, and does not limit in any way the

^{5/} Section 1.110 provides: "Where the Commission without a hearing grants any application in part, or with any privileges, terms or conditions other than those requested, . . . the action of the Commission shall be considered as a grant of such application unless the applicant shall within 30 days . . . file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing."

^{6/} A total of 147 requests for exemption were received in all.
(R. 109-110)

licensee's judgment as to what programs to air on the FM channel, either during the duplication or nonduplication portion of the broadcast day. (R. 114-115)

The Commission also noted that even if the only effect of the rule would be to require stations like KKHI to program different classical selections on the AM and FM stations, this would itself be in the public interest. As to special programming such as live concerts, the Commission noted that time is rarely of the essence for such programs, and delayed broadcasting of such events on AM or FM, might well benefit the public by making such programming available twice. (R. 115)

The Commission also observed:

Many petitioners stress the character of their program service, described as of high quality, valued by listeners, and often "unique", so that it should be available to listeners at all times on whichever service they choose to receive it. This contention is put in many different contexts - good music or classical music, light classical, the only "top 40" station in the market, balanced programming. . . . foreign language . . . and numerous others. (R. 117)

The Commission declined, however, to grant any exemptions on programming grounds alone:

To do so would require a searching inquiry into and evaluation of the character, merit, popularity, and "uniqueness" of the station's programming -- a task we believe difficult and perhaps impossible, and in any event undesirable. 7/ (R. 117)

7/ Two exceptions were made to this rule for New York City stations. WHOM was granted a long term exemption because its Spanish language programming was available to the Spanish speaking population in the

(cont'd)

Other arguments were considered and rejected, including the alleged inability of the large market stations to develop any presently unavailable format:

Bearing in mind the ingenuity and imagination of broadcasters, the fact that only 50% non-duplication is required, and the high degree of flexibility which the broadcaster has in meeting the non-duplication requirement, we do not conceive that non-duplication will result in mere repetition of the program fare already available or loss of diversity in the FM band.^{8/} (R. 119)

Many petitioners, including KKHI, had claimed that separate FM programming would not be financially successful. However, the Commission expressed the view that the action it was taking would stimulate the growth of FM's revenue potential. The Commission carefully analyzed the economic prospects of FM broadcasting, (R. 123-125) and concluded that they were brighter than ever before and were constantly improving. In dealing with the contention that the audience is nondivisible and should be able to switch readily from AM to FM reception of its favorite programming, the Commission found this consideration insignificant in relation to the inefficiency and waste involved in signal duplication.

On January 27, 1967, KKHI filed a further request for exemption or hearing. Simultaneously KKHI filed the results of

7/ (Cont'd) city's fringes and suburbs only on the FM channel since the AM signal did not have sufficient coverage area. (R. 144) WEVD, a Yiddish language station, was also granted a waiver because the AM station shares its frequency with another radio station during a substantial portion of each week. (R. 223-224)

8/ The 50% non-duplication requirement is applicable to the average FM broadcast week but compliance is calculated on an annual basis. However, in any one week, the minimum non-duplication must be 30%. (R. 112)

a new audience survey. This survey, like the others reported by KKHI, indicated substantial audience support for the status quo. (R. 151-217).

On April 27, 1967, the Commission released a Memorandum Opinion and Order (R. 219-225) which denied the KKHI long term exemption request, and set a new date of August 1, 1967, for ^{9/} compliance with the rule. The Commission carefully considered the facts and arguments presented by KKHI on the merits of the exemption request, and concluded that exemption would not serve the public interest. The Commission referred to the general discussion in its earlier opinion (see pp. 10-12, supra), and noted again the inherent waste in using two channels for the same programming. The Commission rejected the economic arguments, as it had in the earlier opinion, and noted that the latest AM-FM financial data showed an improving FM picture. The Commission also said:

We recognize what appears to be the high quality of KKHI's musical programming and that it is liked by its listeners, but there appears no reason why it cannot continue to be available on both services when the stations comply with the rule. 10/ (R. 223)

9/ Subsequently extended. See n. 3, supra, p. 7.

10/ The Commission noted that its action with respect to KKHI's "unique" quality classical format was similar to that taken on other such stations; e.g., WGMS, Washington, D. C., and WQXR, New York City. The Commission also noted (R. 223) that there are a number of radio stations assigned to San Francisco which program classical music: "This illustrates the problem with granting exemption on the ground of 'unique' programming." Ibid.

The Commission rejected the argument that KKHI was entitled as a matter of right to a hearing on the exemption request contained in its last FM license renewal application, because KKHI had rejected grant of its renewal application without grant of the exemption and requested a hearing pursuant to 47 U.S.C. section 309 and section 1.110 of the rules:

This amounts to a contention that a licensee by requesting waiver of any Commission rule in his renewal application, can obtain an evidentiary hearing on whether it should apply to him. Such an argument is clearly without substance. As we have repeatedly said, not every request for waiver warrants a hearing.
(R. 223)

The Commission noted that KKHI had not renewed its economic injury argument in its latest request, found that the showing made by KKHI in other respects was not "substantial" within the meaning of 73.242(c), and accordingly denied both the request for exemption, and the request for hearing. The instant appeals were filed on May 26, 1967.

SUMMARY OF ARGUMENT

KKHI was not entitled to a waiver of the non-duplication rule as a matter of law. The Commission's decision that continued 100% duplication of programming on jointly owned AM and FM stations in the same city would no longer serve the public interest because of the obvious waste involved in using two channels for the very same programming, is in complete harmony with the Commission's earlier determination that the primary responsibility for the selection of programming lies with each individual licensee. The imposition of the new rule does not in any way limit the licensee's freedom to select the programming which in his honest and prudent judgment would best serve audience needs. The licensee has wide latitude in complying with the requirement that 50% of the FM programming must be independent of the AM. The non-duplication rule in no way dictates the nature of the material broadcast, and is directed solely as efficient and rational frequency management and usage.

Nor was KKHI entitled to a hearing on the exemption request. Although the rule provides for exemptions, the Commission never intended to hold evidentiary hearings on each waiver request. It is fundamental that not every request for waiver of a rule or regulation is entitled to a hearing. In each case the showing must set forth reasons, sufficient if true, to overcome the policy decisions implicit in the promulgation of the rule. United States

v. Storer Broadcasting Co., 351 U.S. 192 (1956). KKHI made no such showing, but rather attempted to reargue the policy decisions on which the rule is based. Denial of KKHI's hearing request did not turn on resolution of factual matters. Each of the arguments advanced by KKHI was carefully considered; and the Commission accepted as true the allegations concerning audience satisfaction with 100% duplication, but held that the desire of the KKHI audience to continue the present programming was not sufficient reason to overcome the basic policy determination that 100% duplication no longer served the public interest. Such factual questions as KKHI raised were irrelevant to the waiver request. The Commission correctly declined to consider the alleged "uniqueness" of KKHI's programming. In such circumstances, a hearing would serve no useful purpose.

KKHI had no statutory or other right to a hearing. Neither section 309(e) of the Act, 47 U.S.C. section 309(e), nor 47 CFR section 1.110 was violated by the renewal of the KKHI FM license subject to final action on the waiver request.

To construe 309(e) of the Act and section 1.110 of the rules as KKHI does, would be to read in a substantive right which would effectively negate the usefulness of any rule of general applicability; each licensee would be free to contest in an evidentiary hearing, at each license renewal, the applicability of any rule to his particular facility. Furthermore, the

language of the Act and the rule do not speak to the factual setting in which KKHI argues a hearing was required. Section 309(e) is restricted to situations in which an application is to be denied, whereas the KKHI license was renewed with no requirement for immediate compliance with the rule whose waiver KKHI sought. 47 CFR section 1.110 does not provide KKHI with a right to a hearing on its renewal application since that section by its terms is restricted to partial grants and KKHI was granted a renewal which denied KKHI no operating rights which were otherwise provided for in the Act or in the Commission's rules; the grant was not partial within the meaning of section 1.110.

ARGUMENT

In 1964, following a rule making proceeding in which interested parties were afforded an opportunity to submit their views, the Commission adopted a rule, section 73.242, 47 CFR 73.242, requiring licensees who operated both AM and FM stations in cities of over 100,000 to program the FM station independently of the AM for at least 50% of the average FM broadcast week. The rule requires non-duplication on the FM within a 24 hour period of the same program broadcast on the AM. It provides also that waivers may be granted on a sufficient showing that continued 100% AM/FM duplication by particular licensees would be in the public interest. These appeals do not attack the rule itself, and appellant concedes that it is within the Commission's authority to adopt. (Br., p. 16)

As set forth in the Counterstatement, supra, pp. 4-7, the rule was intended to implement a Commission determination that FM should exist as an independent aural service rather than as an adjunct to an AM facility. In addition it reflected the judgment that using two valuable aural broadcast channels (one AM and one FM) for the very same program material was a waste of a precious national resource that could no longer be justified. KKHI argues, however, that it should have been exempted from the rule primarily because its "unique" programming was preferred by its audience on both AM and FM simultaneously.

The Commission carefully considered this showing, and concluded that it did not overcome the policy considerations on which the rule was based, and denied the request for exemption. The Commission noted that to evaluate KKHI's request on the basis of its alleged unique programming would involve the Commission in a difficult and perhaps impossible task of reviewing and evaluating program formats and that such an undertaking was plainly undesirable since scores of licensees could allege with justification that their programming was to some degree unique to their communities. The Commission also rejected the claim that 100% duplication of KKHI-AM programming would be more in the public interest than adherence to the non-duplication rule.

In the Commission's view the controlling consideration was "the waste involved in using two broadcast frequencies to bring exactly the same intelligence to the same receiver locations" (R. 222). In its judgment the time was ripe, at least in the larger markets where FM set circulation was high, to end this wasteful frequency usage. For this reason appellants request for waiver was denied. This is clearly the kind of judgment that has been committed by the Congress to the Commission. 47 U.S.C. sections 151, 301, 303(b)(f)(g)(r). KKHI has failed to show either that the Commission's action was arbitrary or that a hearing was either required or would be useful under the circumstances.

I. THERE IS NO CONFLICT BETWEEN THE COMMISSION'S DENIAL OF A WAIVER HERE AND ITS REQUIREMENT THAT A LICENSEE BE RESPONSIVE TO THE PROGRAM NEEDS AND INTERESTS OF THE AREA IT SERVES.

KKHI devotes a considerable portion of its brief (pp. 14-22) to the argument that the Commission was required, as a matter of law, to grant the KKHI exemption request. It contends that since its proposed continuation of 100% duplication was a "reasonable exercise of licensee judgment" supported by a documented showing that its listeners preferred this mode of operation the Commission had no option but to grant the exemption. In support KKHI relies on the Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 Pike & Fischer, R.R. 1901 (1960) in which the Commission set out at length the obligations and responsibilities of licensees in the programming of their facilities, and indicated that the role the Commission could properly play in this area was a limited one.

We think this reliance on the Policy Statement is clearly misplaced. By emphasizing the obligation of broadcast licensees to ascertain and respond to the program needs and interests of their communities the Commission in no sense disavowed its own responsibilities under the public interest standard of the Act. See e.g. id. at 1908-1910. The Commission's authority to promulgate the kind of rule at issue here is beyond question. See e.g., 47 U.S.C. 151, 303; National Broadcasting Co. v. United States, 319 U.S. 190 (1943); and see Henry v. Federal Communications

Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962) cert. denied 371 U.S. 821; Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F.2d 670 (1948). Indeed appellant concedes that such authority exists. Consequently its contention that the rule could not lawfully be applied to KKHI is difficult to understand.

Its argument that the rule as here applied is inconsistent with the Policy Statement is we believe without merit.

As the Commission has repeatedly stated in discussing the non-duplication rule, the imposition of the 50% independent FM programming requirement does not impinge in any way on the licensee's freedom of speech, nor on his freedom to choose any program format which he honestly and prudently believes to be in the public interest. The rule prescribes nothing about the programming of the station other than that the licensee must program the FM channel independently of the AM at least 50% of ^{11/} the average FM broadcast week. In fact, compliance with the rule could be minimally achieved by delaying by 24 hours the FM broadcast of only 50% of the AM programming.

We believe it is clear this requirement detracts neither from the principles of the Policy Statement nor from the licensee's exclusive prerogative to select the programming material for its stations. Stated another way, the non-duplication

^{11/} Although compliance with the rule is to be measured on an annual basis, the Commission has specified that in every week, a minimum of 30% of the FM programming must be independent of the AM. (R. 112)

Accordingly, there is no substance to KKHI's contention that the Commission's action was erroneous as a matter of law.

II. THE COMMISSION'S DETERMINATION NOT TO WAIVE ITS AM/FM NON-DUPLICATION RULE ON THE BASIS OF KKHI-FM'S EXEMPTION REQUEST WAS ENTIRELY REASONABLE AND WILL SERVE THE PUBLIC INTEREST.

A. The Denial Of A Hearing On The Exemption Request Was Wholly Reasonable And Well Within The Commission's Discretion.

KKHI argues (Br. pp. 32-37) that the refusal to grant KKHI a hearing was arbitrary and capricious, because the waiver request of KKHI could be fairly determined only by a full evidentiary ^{13/} hearing. We submit that no hearing was necessary on the KKHI request, and that the Commission's decision to deny the waiver was entirely reasonable.

Initially, we note that the provision of the rule permitting exemptions does not specify that evidentiary hearings will be held on requests filed thereunder. Section 73.242(c) provides:

Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of paragraph (a) . . .

12/ (cont'd) that "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." 319 U.S. at 216; Red Lion Broadcasting Co. v. Federal Communications Commission, ___ U.S. App. D.C. ___, ___ F.2d ___, unofficially reported at 10 Pike & Fischer, R.R. 2d 2001 (1967); California Citizens Band Association, Inc. v. United States, 375 F.2d 43 (9th Cir., 1967), cert. pending, 36 U.S.L. Week 3053; Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2nd Cir., 1965).

13/ We restrict our argument at this point to the allegation that denial of a hearing is arbitrary and capricious on the facts of this case. Below, we consider whether, aside from these considerations, a hearing was compelled by statute or regulation.

In its Memorandum Opinion and Order of March, 1966 (R. 109-150) ^{14/} the Commission disposed of 115 waiver requests: 68 requests for long-term exemption were denied, and 27 long-term requests were granted. Twelve stations were granted exemptions for approximately one year, based on a showing of individual economic difficulties. KKHI was one of these twelve. Three full time stations were granted exemptions for reasons unique to those facilities. However, no hearings were held on any of these requests, and as the Commission had indicated in the Report and Order adopting the rule, the "long-term" exemptions would have ^{15/} to be renewed with each successive license renewal. ^{15/} 2 Pike & Fischer, R.R. 2d 1659 at 1678 (1964). Accordingly, the language both of the rule and of the Report and Order adopting it, as well as the consistent practice of the Commission, indicate that trial-type hearings were never contemplated for the exemption requests. Throughout its brief, KKHI lays great emphasis on the waiver provision of the rule. However, the waiver provision does nothing more than particularize section 1.3 of the rules, 47 CFR section 1.3, which provides that any rule may be waived for good cause shown.

14/ A total of 147 requests for various kinds of relief had been received. (R. 109) The thirty-odd remaining requests were either mooted or disposed of in ways not here relevant.

15/ "Long-term" as used in the March, 1966 Memorandum Opinion and Order denotes the remaining period of the then current license term and is synonymous with "temporary" as used in the rule itself. "Temporary" as used in the Memorandum Opinion and Order indicates exemptions of less than the remaining license term.

It is a fundamental rule of administrative procedure that not every request for waiver of a rule or regulation is entitled to an evidentiary hearing. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

The doctrine of the Storer case has more recently been applied in Federal Power Commission v. Texaco, Inc., 377 U.S. 33 (1964), and American Airlines v. Civil Aeronautics Board, 123 U.S. App. D.C. 310, 359 F.2d 624 (1966), cert. denied 385 U.S. 843. In both these cases it was held that a regulatory agency could establish new substantive rules of general applicability in a rulemaking proceeding, and deny individual hearings to applicants or certificate holders whose proposals or operations were in ^{16/} clear violation of the announced standards.

KKHI argues (Br. pp. 22-23) that none of these cases is dispositive of the present facts because "Since in none of these cases was a waiver requested, the Court had no occasion to formulate any rules regarding the adequacy of the request nor to focus upon the circumstances under which a hearing would be necessary." (Br. p. 23) We submit this is clearly erroneous. Although the Storer case

^{16/} Citing these cases, the U.S. Court of Appeals for the Ninth Circuit, in California Citizens Band Association, Inc. v. United States, 375 F.2d 43 (1967), cert. pending, 36 U.S. Law Week 3053, recently sustained the establishment of new and more stringent standards for operation of Citizens Band radio equipment. The new rules were adopted after a rule making proceeding, and became effective in the middle of current license terms. The Court held that the Commission properly denied the numerous requests for individual adjudicatory hearings.

17/

did not arise out of a denial of waiver, the Court's opinion clearly dealt with the question in the following language:

As the Commission has promulgated its rules after extensive administrative hearings, it is necessary for the accompanying papers to set forth reasons, sufficient if true, to justify a change or waiver of the rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for hearing. 351 U.S. 192, at 205.

Measured against this standard, which is entirely adequate for this case, the KKHI request simply failed to set forth reasons, sufficient if true, to justify a waiver. The matters raised by KKHI were essentially policy issues, each of which was disposed of on the broad grounds justifying the imposition of the non-duplication rule. 18/ To the extent the KKHI showing raised factual questions (e.g., whether its programming was unique, and the degree of loyalty of its audience), these questions were irrelevant to the Commission's

17/ In American Airlines, this Court said: "The Storer doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy . . . and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirements, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making."

123 U.S. App. D.C. at 315, 359 F.2d at 629.

18/ In contrast, a number of waiver requests demonstrated that unique technical factors existed which largely vitiated the assumptions underlying the rule. One licensee, for example, operated an AM station on a shared basis, using the frequency for a limited number of hours each week and relinquishing it to other licensees for the remainder of the time. Clearly such a case does not involve undue waste of the AM channel. (R. 223)

decision, which did not rest on resolution of any questions of fact. On the contrary, the Commission accepted the accuracy of KKHI's assertions that its programming was well liked by those polled in the periodic surveys, and was of a high quality. (R. 222) The Commission rejected the KKHI request, however, because it failed to advance sufficient reason for departing from the policy judgments made in the rule making, i.e., that two channels should not be used for the same programming, and that non-duplication would serve the public interest. In effect, the KKHI request amounted to a petition for reconsideration of the basic policy decisions insofar as they related to KKHI. We believe the Storer case stands for the proposition that such requests may be dismissed without a hearing. Cf. National Broadcasting Company v. Federal Communications Commission, 124 U.S. App. D.C. 116, 124, 362 F.2d 946, 954 (1966); Pan American Petroleum Corp. v. Federal Power Commission, 116 U.S. App. D.C. 249, 322 F.2d 999 (1963).

As the exemption request was bottomed primarily on the programming arguments of KKHI, the Commission referred to its March 1966 Memorandum Opinion and Order (R. 109-150), where the Commission had carefully considered the question whether exemptions should be granted on programming grounds alone, and concluded that such a policy would be unwise:

To do so would require searching inquiry into and evaluation of the character, merit, popularity, and "uniqueness" of the station's programming -- a task we believe difficult and perhaps impossible,

and in any event undesirable. It would be difficult, if not impossible, to arrive at any significant standards on which to base such a decision, since every station differs to some degree from every other station. (R. 117)

In disposing of the KKHI request, the Commission specifically directed its attention to the alleged "unique" programming of KKHI:

We recognize what appears to be the high quality of KKHI's musical programming and that it is liked by its listeners, but there appears no reason why it cannot continue to be available on both services when the stations comply with the rule. (R. 222-223)

KKHI argues (Br., p. 15) that its audience prefers to have the same programming available simultaneously on AM and FM. But the Commission observed that the audience may benefit from having the same programming available at two different times (R. 115), and pointed out that in any event the licensee remained free to present 50% of its FM programming simultaneously with the AM and was free to do so during periods when this factor might be particularly important, i.e., during "drive times." ^{19/} (R. 123)

It bears emphasis that a hearing in this case would serve little or no useful purpose, contrary to KKHI's allegations (Br., pp. 33-34) that a number of questions were presented which the Commission was bound to resolve and which could be resolved only in an adjudicatory hearing. Thus, in disposing of the KKHI "unique programming" argument, the Commission did not find that KKHI's programming was not unique; it merely indicated, in passing, that the general difficulty alluded to above was present in the

^{19/} In any one week, the duplication must be no more than 30%. See n. 11, supra, p. 21.

instan' case by noting (R. 223) that a number of San Francisco stations claimed to be "good music" stations. In any event the issue did not require a hearing under the Storer test since the Commission had already determined in disposing of more than 100 exemption requests, that programming would not be evaluated on a case by case basis.

KKHI also suggests that the Commission "brushed aside" its claim of coverage differences between AM and FM facilities. KKHI suggests that because many of those listening to the KKHI AM/FM programming have only one kind of receiver or the other, there is no substantial waste because the coverage is, in effect, necessary to reach those with only AM or FM receivers. In its March, 1966 Memorandum Opinion and Order, the Commission explained why these matters did not warrant waiver:

Obviously, even in the most extreme cases of coverage differences and reception problems, wasteful duplication exists to a large extent where both signals can be acceptably received, one serving merely as an echo of the other. (R. 116)

The Commission's observation (R. 222) that KKHI does not claim substantial coverage differences had reference to the size and location of the two local service areas, and was quite correct since KKHI, unlike many other petitioners (see e.g., R. 115, 137, 141), did not emphasize the geographic disparity of AM and FM reception, but rather concentrated on the ability of many persons within the common area to receive the programming on only AM or FM.

20/ Many of the petitioners also claimed inadequacy of the AM signal in built-up areas (R. 115).

KKHI also suggests that the Commission wrongly concluded that the "continuity" of listening argument, advanced by KKHI, was insignificant. The Commission had previously rejected this argument as being patently insubstantial when arrayed against the profound waste and inefficiency of using two channels for the same programming. (R. 123) There is here no disputed question of fact but merely another attempt to reargue the policy considerations lying behind the rule itself. The expressed desire of most of the KKHI listener survey respondents to continue the present 100% duplication is not a sufficient showing to overcome the presumption of the rule.

Finally, KKHI argues that its audience is "most unusual and loyal" and prefers the present system. It asserts that the Commission totally rejected KKHI's claim that its "sophisticated audience prefers one excellent service." (Br., p. 35) We submit this is clearly inaccurate. The Commission's response, on the contrary, accepts as true the allegations, and concludes that they are insufficient to outweigh the policy considerations on which the rule is based. Again, there is no disputed question of fact, and all KKHI is seeking is an opportunity to reargue policy questions which were carefully considered and rejected in earlier decisions.

21/ KKHI also raises the issue of the economics of programming two separate program services (Br., p. 35). As we have indicated previously, KKHI was originally given a waiver on financial (cont'd)

In arguing that a hearing should have been held, KKHI cites rules of the Commission (Br., p. 30) in which hearings are generally held on the question whether the public interest would be served by waiver of the rule in question.

We submit the proper question here is whether the Commission's action in this case was arbitrary and capricious. KKHI itself notes that a number of Commission rules have been held to be of such paramount importance that waivers are either unobtainable or available only under most unusual situations,^{22/} and the question in each case must be whether the refusal to waive the rule in question, or to hold an evidentiary hearing on a waiver request, lies within the range of the Commission's discretion.^{23/}

21/ (cont'd) grounds until April 1, 1967 (R. 129), since extended to the present time. In granting this relief, the Commission noted: "If exemption is to be continued beyond that date the stations must be prepared to make a further showing . . ." (R. 111) In fact, KKHI made no further showing, and abandoned the economic hardship argument in its January, 1967 request for continued exemption. (R. 151-217) Economic injury, of course, would be significant substantively, only if it could be shown that the public would suffer as a result. See Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

22/ Thus, in Bendix Aviation Corp. v. Federal Communications Commission, 106 U.S. App. D.C. 304, 272 F.2d 553 (1959), cert. denied sub nom. Aeronautical Radio, Inc. v. Federal Communications Commission, 361 U.S. 965, this Court held that an application for a frequency no longer available for the use proposed need not be set for hearing. And in KXA, Inc., 5 Pike & Fischer, R.R. 2d 338 (1965), recon. denied, 5 F.C.C. 2d 60 (1966), affirmed by this Court without opinion by order dated June 30, 1967, the Commission dismissed without hearing an application in violation of the Commission's clear channel policies.

23/ The "10% rule" on which KKHI primarily lies, is no longer in effect, and has been superceded by a "go no go" system (47 CFR 73.37) barring at the threshold and without hearing, applications which do not meet minimum technical criteria. Natick Broadcast Associates, Inc., 6 F.C.C. 2d 607 (1967) appeal pending, Natick Broadcast Associates, Inc. v. Federal Communications Commission, Case No. 20,834 (D.C. Cir.)

KKHI relies on Interstate Broadcasting Company v. Federal Communications Commission, 116 U.S. App. D.C. 327, 323 F.2d 797 (1963) in which the Commission refused to consider interference to a station which occurred outside its "normally protected contour," although the station had alleged that special factors were present which compelled a hearing on the question. The Court reversed because the Commission had not adequately dealt with the question whether "special circumstances" were present. Citing the Storer case, the Court said:

If the Commission concludes that WQXR's specific factual allegations, construed in the light of the affidavits, testimony, and exhibits, if true, are sufficient to preclude grant of either application, it must offer WQXR an opportunity to prove the allegations. If the Commission concludes that the allegations are not sufficient it may decide both cases against WQXR, provided it supports its conclusion with explanations founded on sufficient findings of fact. 116 U.S. App. D.C. at 332, 323 F.2d at 802.

We believe the present case comes well within these guidelines. The Commission carefully considered the allegations raised by KKHI, and carefully explained why it would not set the KKHI application for hearing on the showing made. ^{24/}

^{24/} The Storer principle has more recently been cited by Chief Judge Bazelon, concurring in Pacific FM, Inc. v. Federal Communications Commission, 123 U.S. App. D.C. 352, 359 F.2d 1018 (1966): "Having already heard general objections to its rule, however, the Commission here had a broad discretion to determine whether any further hearings were required on the exemption claim." (Footnote omitted.) Id. at 357, 359 F.2d at 1023.

In sum, the Commission determined that KKHI had not advanced sufficient reason to waive the rule. Although KKHI brushes aside the undeniable waste in using two channels for the same programming (Br., p. 21), the factor is basic to the decision requiring KKHI to non-duplicate, and is, we believe, clearly in the public interest.^{25/} Indeed, KKHI expressly concedes this (Br., p. 16), and merely argues that the application of the rule to KKHI was erroneous. But KKHI failed to demonstrate why compliance with the rule would not be in the public interest; and the Commission's decision was reasonable and well within its discretion.

B. KKHI Had No Statutory Or Other Right To An Evidentiary Hearing On The Exemption Request.

KKHI argues (Br., pp. 22-31) that under section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. section 309(e), and section 1.110 of the Commission's rules, 47 CFR section 1.110, KKHI was entitled to a hearing on the waiver request.

As we have detailed in our counterstatement, supra, p. 9, KKHI filed its AM and FM renewal applications in August of 1965, and included therein a request for exemption from the non-duplication rule (R. 59-78), as part of the licensee's response to part IV of the application, dealing with the programming practices of the

^{25/} In Television Corporation of Michigan v. Federal Communications Commission, 111 U.S. App. D.C. 101, 104-5, 294 F.2d 730, 733-734 (1961), this Court said: "Television and radio are affected with a public interest: the Nation allows its air waves to be used as a matter of privilege rather than of right."

licensee. KKHI also demanded a hearing if the request could not be granted. On November 5, 1965, the Commission granted the FM renewals (R. 104-5), indicating that it was "without prejudice to whatever action the Commission may take on your pending request for waiver of the requirement [of the non-duplication rule]." (R. 104)

On November 30, 1965, KKHI addressed a letter to the Commission (R. 106-8) in which it sought reconsideration of the "partial grant," and renewed its request for a hearing on the exemption request. KKHI maintained that the Commission's action "constituted a denial of the application as filed," and specifically denied consent to having its exemption request "determined on the pleadings in the separately pending proceeding involving petitions by over 100 licensees for temporary exemptions." (R. 107-8)

KKHI claims that the Commission's action in granting the FM renewal while deferring final decision on the exemption request violated section 309(e) of the Act, which provides, in part:

If, in the case of any [renewal application] a substantial and material question of fact is presented or the Commission for any reason is unable to make the [public interest findings] . . . it shall formally designate the application for hearing on the ground or reasons then obtaining . . .

KKHI argues that section 1.110 of the Rules, 47 CFR 1.110 supports its claim to a hearing on these facts. The rule provides:

Where the Commission without a hearing grants any application in part, or with any privileges, terms or conditions other than those requested . . . the action of the Commission shall be considered as a grant of such application unless

the applicant shall, within thirty days from the date on which such grant is made or from its effective date if a later date is specified, file with the Commission a written request rejecting the grant as made. Upon receipt of such request, the Commission will vacate its original action upon the application and set the application for hearing in the same manner as other applications are set for hearing.

KKHI's argument that section 309(e) of the Act and 1.110 of the rules guaranteed it a hearing on the facts described above is plainly erroneous. KKHI has cited no authority for the proposition that any licensee may force an evidentiary hearing on any of the Commission's rules by refusing to accept a renewal unless the rule is waived for the new license term. In fact, this Court has rejected a similar argument. In Transcontinental Television Corporation v. Federal Communications Commission, 113 U.S. App. D.C. 384, 308 F.2d 339 (1962), this Court dealt with the contention that a party had been denied its 309(e) renewal rights when its channel was deleted in a rule making proceeding held in the middle of the license term, to be effective at the expiration of the outstanding license. In rejecting this argument the Court said:

The loss of such rights as ordinarily pertain to a renewal application is not a modification of license when the loss is due to the elimination of the channel in a proceeding valid for the type of Commission action which resulted

in the elimination. 113 U.S. App. D.C. at 389, 308 F.2d at 344. 26/

It is moreover well settled that when a rule is adopted in a valid rulemaking procedure it is incorporated in subsequently granted licenses automatically. Beloit Broadcasters, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___, 365 F.2d 962 (1966). See Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 68, 325 F.2d 637, 641 (1963). To construe 309(e) of the Act and section 1.110 of the rules as KKHI suggests would be to read in a substantive right which would effectively negate the usefulness of any rule of general applicability; each licensee would be free to contest anew in an evidentiary hearing the application of the rule to his particular facility with each application for renewal of license. To state the proposition is to illustrate its untenability. "If modification of licenses were entirely dependent upon the wishes of existing licensees, a large part of the regulatory power of the Commission would be nullified." Peoples Broadcasting Co. v. United States, 93 U.S. App. D.C. 78 at 80, 209 F.2d 286 at 288 (1956).

26/ In summarizing the appellant's argument, the Court also refers to 47 CFR 1.65 (1958). See 113 U.S. App. D.C. at 388 n. 14, 308 F.2d at n.14. Now recodified as 47 CFR 1.62, this section merely embodies the provisions of section 9(b) of the Administrative Procedure Act, 5 U.S.C. section 558(c), and provides that the pre-existing license shall continue in effect until "the Commission shall make a final determination with respect to the renewal application." The provision thus has no applicability to this case since the renewal was finally granted before the prior license expired.

Furthermore, the right claimed by KKHI does not square with the language of the statute or with the action taken by the Commission. Section 309(e) is designed to protect an applicant's right to a hearing before its application is denied, whether it be an original or a renewal application. Yet the renewal application of KKHI was specifically granted by the Commission, based on the intrinsic finding that continued operation of KKHI on a 100% duplicated basis, would be in the public interest until the Commission had reached a final determination on the waiver request.

27/
The decision to withhold immediate action on the exemption request was clearly reasonable and well within the Commission's discretion to determine the scope of its own proceedings, Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S.

27/ KKHI argues that the denial of its exemption request in the middle of the license term without a hearing was a violation of section 316 of the Act, 47 U.S.C. section 316. KKHI at no time raised this issue before the Commission, and is accordingly barred from raising it here, 47 U.S.C. section 405; Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143 (1946); Florida Gulfcoast Broadcasters, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965). In any event, the argument is wholly without merit. The grant of the FM renewal specifically conditioned operation under the renewed license on the possibility that the exemption would ultimately be denied. Since the license was renewed for a new term on this express condition, there can be no legal modification if the condition comes into effect. Cf. National Broadcasting Co. v. Federal Communications Commission, 124 U.S. App. D.C. 116, 362 F.2d 946 (1966); The Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963).

134 (1940). The Commission may properly defer until a later time matters on which applicants may wish immediate consideration, Goodwill Stations, Inc. v. Federal Communications Commission, supra.

Similarly, reliance on section 1.110 of the rules is misplaced. By its terms, that rule is restricted to situations in which the applicant receives a "partial grant," or something less than a full authorization. See, e.g., WIRL Television Co. v. United States, 102 U.S. App. D.C. 341, 253 F.2d 863 (1958); WHAS Inc., 2 Pike & Fischer, R.R. 2d 1073 (1964); National Broadcasting Co., Inc., 20 Pike & Fischer, R.R. 411 (1960). In each of these cases the Commission made a partial or conditional grant which amounted to something less than the applicant would in the normal course be entitled to under the Commission's rules. But here the situation is just the reverse: KKHI sought, in effect, more than it was entitled to; it sought a license renewal free of the restriction legitimately imposed by the non-duplication rule. As such, it was not entitled to a grant on the terms requested, and section 1.110 cannot reasonably be construed as affording it a hearing as of right on the exemption request. Otherwise a rule would not be a rule at all but would simply serve to outline the areas of inquiry in a subsequent adjudicatory proceeding. Such a result

is on its face unreasonable. Cf. United States v. Storer Broadcasting Co., supra.
28/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Commission's actions denying the relief requested should be affirmed.

Respectfully submitted,

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September 11, 1967

28/ In any event, it is significant that KKHI, despite its letter of November 30, 1965, continued to operate KKHI-FM. Had it really wished to reject the grant on the terms offered, the way was open; KKHI might have turned in its license and ceased operation; its letter of November 30, 1965 "rejecting" the grant as made was a nullity since KKHI did not reject the grant at all, and KKHI recognizes that in fact it may not have preserved its rights (Br., p. 31, n. 19).

APPENDIX

47 CFR §73.242: Duplication of AM and FM programming.

(a) After October 15, 1965, licensees of FM stations in cities of over 100,000 population (as listed in the latest regular U.S. Census Reports) shall operate so as to devote no more than 50 percent of the average FM broadcast week to programs duplicated from an AM station owned by the same licensee in the same local area. For the purposes of this paragraph, duplication is defined to mean simultaneous broadcasting of a particular program over both the AM and FM station or the broadcast of a particular FM program within 24 hours before or after the identical program is broadcast over the AM station.

(b) Compliance with the non-duplication requirement shall be evidenced by such showing in connection with renewal applications as the Commission may require.

(c) Upon a substantial showing that continued program duplication over a particular station would better serve the public interest than immediate non-duplication, a licensee may be granted a temporary exemption from the requirements of paragraph (a) of this section. Requests for such exemption must be submitted to the Commission, accompanied by supporting data, at least 6 months prior to the time the non-duplication requirement of paragraph (a) of this section is to become effective as to a particular station. Such exemption, if granted, will ordinarily run to the end of the station's current license period, or if granted near the end of the license period, for some other reasonable period not to exceed 3 years.

REPLY BRIEF FOR APPELLANT-PETITIONER

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For the District of Columbia Circuit

No. 21,017

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Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

*APPEAL FROM A MEMORANDUM OPINION AND ORDER
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No. 21,018

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v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

*PETITION FOR REVIEW OF ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION*

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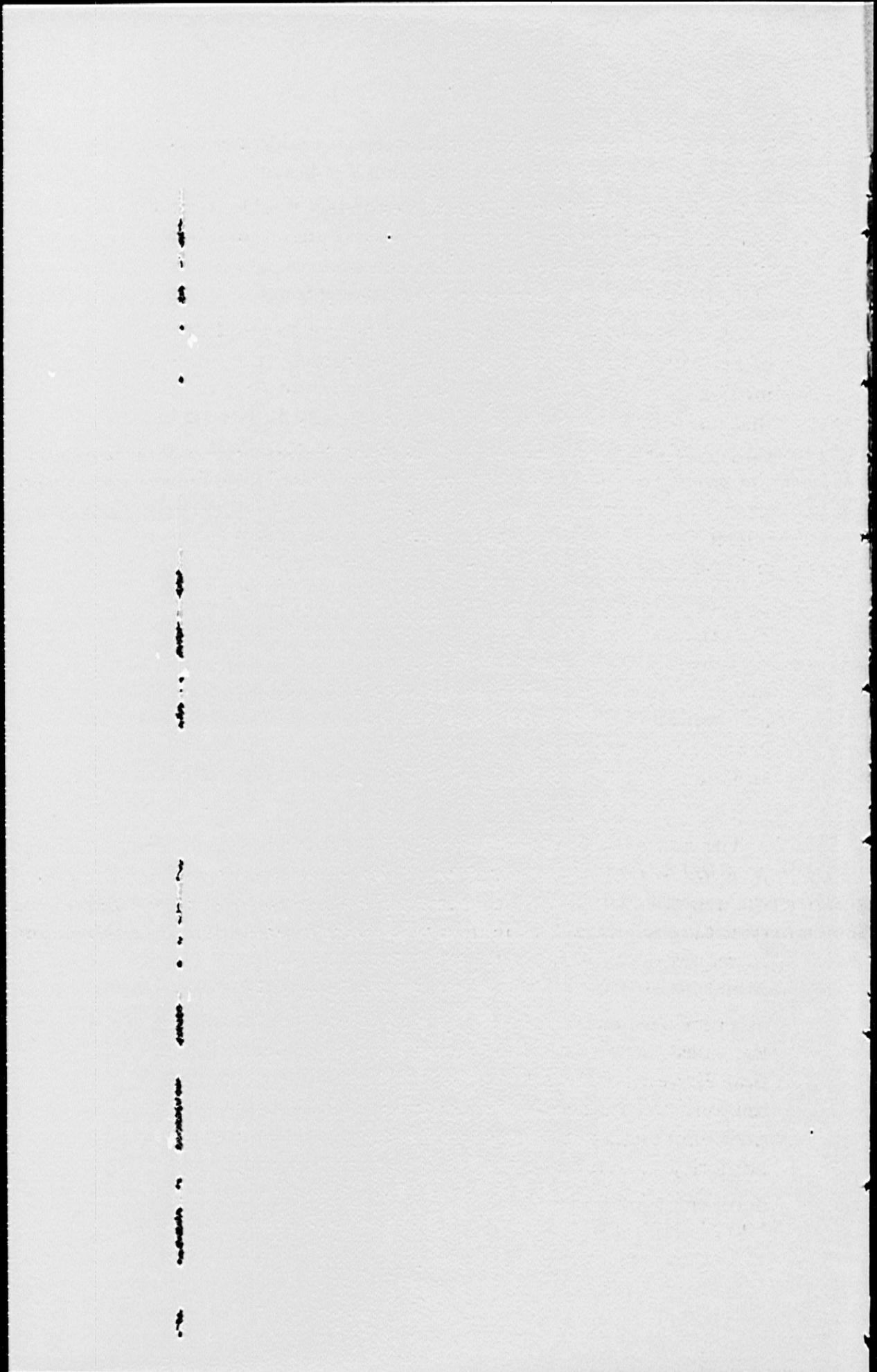
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**REPLY BRIEF FOR
APPELLANT-PETITIONER**

I

In the Commission's "Counterstatement of the Case" it notes that the Appellant "does not challenge the reasonableness of the rule or the Commission's authority to adopt it." (Br. p. 2) Appellant wishes to reemphasize this concession because in a number of later points in the Commission's brief, it misdirects its argument by assuming that Appellant is challenging the adoption of the rule itself. Such is clearly not the case.

The basic thrust of Appellant's argument is that the rule properly provides for exemptions where the public interest would be served and that KKHI-FM made such a public interest showing in its renewal application under Section 73.242(c). Even if the showing was not sufficient on its face, Appellant raised significant public interest factors and questions, which required that the application be designated for hearing.

The Commission's "Counterstatement" describes at some length the details of the Commission's Memorandum Opinion and Order released March 15, 1966 (Br. pp. 10-12, R. 109-150, 7 Pike & Fischer R.R. 99 (1966)). It should be made clear that this Order was a general order disposing of some 115 "Exemption Requests" then pending. The KKHI "Exemption Request" was in fact granted for a limited period of time based upon financial considerations (R. 111, 7 R.R. 2d at 102) but this grant constituted no ruling on the other matters specifically raised by KKHI-FM. Therefore, the general observations disposing of many of the "Exemptions" are certainly not applicable to KKHI-FM's request unless expressly mentioned in the Opinion and Order here under review.

For example, the Commission's Brief (pp. 10-11) relies upon the Commission's March 15, 1966 Order, (R. 114-115,

7 R.R. 2d at 104-05) wherein the Commission observed that the rule affects only 50% of the broadcast week and "does not limit in any way the licensee's judgment as to what programs to air on the FM channel, either during the duplication or non-duplication portion of the broadcast day." This may be true in connection with other "Exemption Requests", but it is certainly not true in connection with KKHI-FM's request. Its ascertainment of community needs led it to propose a single unified program service of high quality classical music interspersed with special program features and related talk programming. Since KKHI-FM is now told that it can't carry this integrated schedule, clearly it is being limited severely in accomplishing its objective. It may be that for the majority of stations that do not have a unique format the decision to carry different selections or choose a different format is not harmful, but in connection with KKHI-FM's operation, to be forced to carry different FM programming or utilize a different format totally destroys the present programming concept.

The Commission points out (Br. p. 11) that in the March, 1966 Order, the Commission declined "to grant any exemptions on programming grounds alone" (R. 117; 7 R.R. 2d at 107). However, in the March, 1966 Order, the Commission granted an exemption based in part on "unique" programming, namely an exemption to Station WHOM in New York City because of the Spanish language programming rendered to the area (R. 144, 117, 7 R.R. 2d at 107). Then, again, in the very order here under review, in connection with Station WEVD-FM in New York City, an exemption was granted to WEVD-FM, New York, for among other reasons, the "unique" Yiddish programming carried. (R. 223-224).

Thus, despite the present claim that "unique" programming cannot be a proper basis for an exemption, the Commission's own rulings show this is not so! Appellant urges that its "unique" programming argument is every bit as substantial as those supporting the WHOM and WEVD-FM

exemptions. At the very least, these exemptions granted to others show that unique programming is *not* an irrelevant consideration.

It should be noted in connection with the March, 1966, Memorandum Opinion and Order, that 42 out of the 115 exemption requests were granted. (R. 110-111; 7 R.R. 2d at 101-102). This clearly indicates that the rule is not a firm and fixed standard, subject rarely if at all to exemptions. Twenty-seven of these exemptions were based upon the fact that the associated AM station in the case was a daytime only or limited time, or a station operated only briefly at night (R. 111; 7 R.R. 2d at 102).

It is not at all clear why simply because the associated AM station operates daytime only, the FM station should be exempt from the 50% independent programming requirement. In fact, one might argue that it would be even easier for the FM station to meet the requirement since it was already presenting unduplicated programming during nighttime hours. The Commission seems to hold that the "substantial problems such AM stations face as a result of their limited operating hours" justifies some relaxation of the 50% nonduplication requirement. (R. 120; 7 R.R. 2d at 110). In any event, whatever the public interest considerations, the result suggests that the Commission is obligated and indeed willing to examine the specific equities and needs of the daytime stations. This is all that KKHI-FM requests, namely, the right to demonstrate that its operating characteristics are equally "unique" and support continued "exemption".

Three other stations were granted long-term exemptions in the March, 1966 Order, including the one granted to WHOM because of its unique foreign language programming; two others were granted to San Juan stations on the grounds that their signals were being used to relay broadcast material to commonly owned stations on the other side of the Island (R. 122; 7 R.R. 2d at 111). Here, again, "unique" circumstances warranted a grant of the exemption, even though "wasteful" duplication resulted. Finally, twelve grants were

made to individual stations for economic reasons (R. 111, R. 129; 7 R.R.2d at 111). Here, the individual equities of the stations and the adverse economic impact which would be caused to them were taken into consideration. All of these cases taken as a group show that a variety of different factors have supported exemptions.

II

On pp. 20-24 of its Brief, the Commission attempts to answer Appellant's claim that, as a matter of law, the requested exemption should have been granted as a reasonable exercise of licensee responsibility. The Commission's answer, however, misses the point of Appellant's argument. The Commission's argument amounts simply to the proposition that since the Commission had the authority to adopt the duplication rule in the first place, there is no significant relationship between enforcement of the rule and a licensee's responsibilities under the Program Policy Statement. Appellant urges that this is fallacious.

The nonduplication rule expressly provides for an exemption where continued program duplication would serve the public interest. In Appellant's view, the nonduplication rule and the Policy Statement are consistent. The nonduplication rule establishes a general standard of programming performance, one which normally would govern the exercise of licensee responsibility. However, where, as here, a licensee through diligent and good faith ascertainment of community needs as required by the Policy Statement, finds that continued duplication is in the public interest, the exemption provisions afford it relief.

The Commission's Brief goes astray when it attempts to argue (1) that the nonduplication rule does not, in any way, infringe upon the licensee's "freedom to choose any program format which he honestly and prudently believes to be in the public interest" and (2) the nonduplication rule is directed *solely* at "efficient and rational frequency management" and is not concerned with substantive program

material (Br. pp. 21-22). These two points avoid the issue and consist more of semantics than logic.

In the first place, it is clear that when KKHI-FM is told that it cannot carry the program material it wishes when it wishes, then the rule — no matter what its purpose — is clearly interfering with the licensee's freedom to choose its programming. Obviously this rule affects programming. This fact does not *per se* invalidate the rule; but the fact must be conceded.

This then suggests the fallacy of the second Commission argument that the rule is directed "solely" to frequency management and usage. Such an argument fallaciously isolates only one aspect of the impact of the rule, namely, the frequency management aspect. Here, unlike other rules which may be limited to technical or financial matters (e.g., rules regarding the type of transmitter to be installed), this rule goes directly to the question of what material may be broadcast. The Commission, itself, recognized the programming aspects of the rule when it added the exemption provision and when it granted the exemptions mentioned earlier.

Inevitably, then, the Program Policy Statement becomes relevant. The relevance is fully discussed in Appellant's Brief (pp. 14-22).

It is Appellant's position that the Program Policy Statement codified the legal and constitutional limits of the Commission's authority over programming matters. In other words, the Commission's programming authority under Section 326 and the First Amendment, is fully exploited and developed in the Policy Statement. In addition, the statement points out the programming rights and limitations of broadcast licensees. They may not program to suit their own whims. They must program to serve the public interest. Licensees must use reasonable methods to determine what the public desires, and must program accordingly. The Commission's role is to see that licensees properly ascertain public needs and interests. But once those needs have been prop-

erly ascertained, it is the legal right and duty of the licensee alone to develop programming to serve those needs. If the licensee uses a proper system for measuring public needs and desires and if his programming is reasonably related to those needs, then his programming judgment is final.

The Commission now argues (Br. pp. 22-23) that even if the Commission's action is at odds with its own "policy statement" this would not establish that the waiver was required as a matter of law. Appellant disagrees. If the nonduplication rule is *applied* in such a way as to deny the proper scope of licensee freedom to choose its programming, then the nonduplication rule would illegally infringe upon licensee's statutory rights. That being true, if Section 73.242 is applied so as to limit licensee's rights under the policy statement, or if the Commission's action exceeds its own authority as described in that statement, then such action is illegal.

As heretofore argued, under the exemption provisions (Section 73.242(c)), Appellant has spelled out in detail how its duplicated programming will best meet the needs of the San Francisco area audience, how it reflects what the audience desires and how it reflects the licensee's own judgment of how best to present high quality classical music programming. The Commission's refusal to accept this fully documented decision violates the basic principles of the Policy Statement and is thus illegal.

III

On pages 24-34, the Commission deals with Appellant's argument that the denial of a hearing was arbitrary and capricious. The Commission's Brief reverses the order of presentation as set forth by Appellant.

It should be emphasized that Appellant's basic argument on the procedural issue rests upon its statutory right to a hearing upon the filing of its renewal application. Unless Appellant's showing in support of continued duplication under the express exemption provision (Section 73.242(c)) is frivolous, patently defective or erroneous, or clearly insubstantial, then Section 309(e) requires a hearing if the Commission cannot

grant the application as presented. This point is fully developed in Appellant's Brief, pp. 22-31.

With this understanding of Appellant's argument in mind, attention is directed to the Commission's Brief, Section II A. On page 25, it attempts to brush aside the exemption provision (Section 73.242(c)) by simply equating that provision to Section 1.3 of the rules, the general waiver provision. But the two are not of equal significance. First, there are different kinds of rules with different consequences in terms of "waiver" requests. All such requests are not to be treated the same. (See Appellant's Brief, pages 28-29).

Furthermore, the Commission here specifically read in an intended flexibility by providing for exemption requests where appropriate. The "legislative" history supports this conclusion.¹

Section 1.3, on the other hand, provides only a procedural device to bring to the Commission's attention unusual or extraordinary circumstances justifying a waiver of a given rule. Section 1.3 is not, itself, an indication of Commission policy as regards any particular rule, and is no measure of the intended flexibility with which a particular rule is to be interpreted. Section 73.242(c) is a clear substantive expression of Commission policy to the effect that continued duplication may indeed serve the public interest when a proper showing is made.

¹Paragraph 46, *AM Station Assignment Standards*, 2 Pike & Fischer, R.R. 2d 1658, 1678 (1964). It reads as follows:

"The rule also provides that individual licensees may request that application of the rule be postponed as to them for their current license period. Such requests must be submitted at least six months prior to the time the non-duplication requirement is to go into effect and must contain a substantial showing that the public interest—as opposed to the private interest of the licensee—would be served by allowing unlimited program duplication for an additional period of time. It would be necessary for the licensee to renew his request for continued temporary exemption from the non-duplication rule at the end of each license period."

The Commission next argues that the *Storer* case² sets a sufficiently definitive standard against which to judge the instant proceeding (Br. pp. 26-28). Appellant agrees that a general standard was established. But this standard only states the obvious: "Congress does not intend the Commission to waste time on applications that do not state a valid basis for hearing."

Appellant argues that to hold a hearing on the exemption request would not be a waste of time; the Commission argues to the contrary. Hence, it becomes necessary to establish additional tests by which these two arguments can be judged. Appellant attempts to do so in its Brief (pp. 28-33).

As to the particular areas which Appellant wishes to develop in hearing, the Commission argues that these are essentially policy matters (already disposed of) or alternatively, that they are factual questions which are irrelevant to the Commission's decision. Neither of these conclusions are justified.

As to the question of the "uniqueness" of the KKHI-FM programming, its responsiveness to local needs and the desires of its audience, Appellant does not agree that this is simply an irrelevant question. (See pp. 27-28 of Commission Brief). It may well be that as a general rule, the task of making a "searching inquiry" into a station's program service is "difficult" and even painful (R. 117). But, here, the programming was of such a highly specialized nature and the joint operation such an integral part of the format, the Commission could not avoid its responsibilities simply because they were time consuming and difficult! As KKHI-FM argued, with the full support of its audience, the public interest would be better served by providing *one* high-quality specialized programming service.

It is difficult to see how this could be irrelevant. Indeed, in at least two other cases already cited *supra*, p. 2 (WHOM and WEVD-FM) "unique" programming was an express basis

²351 U. S. 192 (1956).

for exemption. In reality—Appellant submits—the Commission did not in fact here consider the programming irrelevant. Rather the Commission refused to accept the validity of the Appellant's argument that its programming was "unique." Lip service was paid, as the Commission's Brief points out (p. 29), to the alleged uniqueness of the programming, but the Commission then totally rejected the argument by stating "there appears no reason why it cannot continue to be available on both services when the stations comply with the rule." (R. 222)

The facts are, as urged by KKHI, that there is every reason to believe that this high-quality programming cannot be available on both services. KKHI AM and FM is able to offer this unique quality format only because it is able to utilize both carriers for this programming. Its format is designed to present an integrated schedule of music, music program features and special local live programming. The required presentation of different selections, or different features, at different times at least 50% of the time, would disrupt the scheduling in a wasteful and inefficient manner. (R. 59-61, 69-75, 235-259).

Furthermore, the production of the one high quality program service requires effort and expense. Because of the economics of broadcasting, there is doubt as to whether two programming services of equal quality could be produced when each would be serving only its portion of the total audience. Certainly, as KKHI has stated, the tremendous financial drain in attempting to duplicate separate but equal quality programming would not be offset by the marginal benefit of receiving two services. (R. 8, 77, 13, 14, 18-20, 90-93).

These factors, coupled with the uniqueness of the audience, and the area, and the audience's expressed preference for one high-quality classical music programming, sets the KKHI proposal apart.

Just as it rejected the claim that KKHI AM and FM would not be able to provide two high-quality program services, so it rejects the claim that the KKHI programming is in fact

unique at all. The opinion here under review, points out, in footnote 5 to Paragraph 9, (R. 223) that at least one other San Francisco station has been granted an exemption because of its "classical format" and that further "there are other good music stations in San Francisco." The inference, of course, is that even assuming the programming is somewhat distinctive, it is not so distinctive so as to be considered "unique".

Appellant simply disagrees with this conclusion. KKHI-FM stated as a fact that it was the only station programming full time on both the AM and FM facilities the "Music of the Classics." (R. 2). A hearing is necessary to resolve the dispute.

In summary, Appellant's argument as to needs and interests of its audience and the "unique" programming offered goes to the root of the "exemption" request. If similar arguments can exempt WHOM and Station WEVD-FM, New York, then why isn't KKHI-FM at least entitled to prove the needs of its audience and the uniqueness of its programming?

The Commission's Brief (p. 30) also misconceives Appellant's argument concerning the claim of coverage differences. Appellant argues that many of its listeners possess only one kind of receiver; hence, it was not a waste to have the same programming on both carriers. Second, in various areas there was only one service available, either AM or FM; hence, there would be no substantial waste. Third, that even where listeners had both an AM and an FM set they tended as a matter of personal habit to listen to one or the other, depending on where they were, or what particular program offering was involved; hence, to have the same programming on both afforded them the opportunity to listen to the desired high quality programming as they wished. Fourth, that because of the unique characteristics and differences between AM and FM reception, and the type of music offered (classical), there were advantages at times to

one or the other; hence, there would not be the waste normally involved.³

The Commission disposed of these arguments simply stating that "KKHI does not make a substantial claim of coverage differences" (R.222, Fn. 4). This, however, is not an answer to the overall coverage differences which KKHI suggests is unique to its format. A hearing would develop this point.

Finally, it should be noted that the "continuity of listening argument" which Appellant has urged throughout, is thoroughly documented by five audience surveys involving over 8000 persons. The result of *every* survey conducted by KKHI, supported by hundreds of individual comments, support continued duplication; the responses supported the concept of continuity of listenership. Perhaps it is true that as a general rule continuity may not be "a significant consideration." Here, however, the "continuity" argument is most "significant" and the Commission's refusal to permit the development of this argument on the *prima facie* showing made is arbitrary and capricious.

In summary, the matters raised by KKHI-FM were peculiarly applicable to its local situation. They support a conclusion that Appellant's request should be treated in a different manner than that normally accorded under the general rule. Thus, contrary to the Commission's Brief, the factual and policy matters raised by Appellant do not constitute a mere re-argument of the grounds justifying the rule, itself, nor are the matters irrelevant to a proper Commission consideration of the request. The very uniqueness of Appellant's case warrants the special consideration, as expressly contemplated by the "exemption" provisions of Section 73.242(c). The hearing procedure is the proper vehicle for developing these considerations.

³(R.2, 3, 72, 156-57, 168-69). See the Commission's own concession as to the relative advantages of AM and FM (Br. p. 4, Fn. 2).

IV.

At pp. 34-40 of the Commission's Brief, attention is directed to the statutory right of Appellant to an evidentiary hearing on the exemption request. Appellant wishes to make it clear that its right to a hearing, in the main, depends upon the provisions of Section 309(e) regarding renewal applications, when considered in connection with the showing made by Appellant in support of its exemption request.

Unfortunately, the Commission's Brief distorts Appellant's argument (Br. pp. 36-38). Appellant is not urging that "a licensee may force an evidentiary hearing on any of the Commission's Rules by refusing to accept a renewal unless the rule is waived for the new license term."

Appellant has conceded the Commission can adopt the rule and that the rule as adopted becomes applicable upon the filing of a renewal application. Furthermore, Appellant has conceded that there are rules which by their terms and purposes are practically inviolate and subject rarely, if ever, to exception.⁴ Appellant has further conceded that hearings aren't necessary where the showing is frivolous, insubstantial or otherwise legally insufficient to support a waiver of the rule.

It is Appellant's position, however, that Section 309(e) of the Act affords it the clear right to hearing on the rule, where as here Appellant has made a substantial showing in support of the exemption—even though the Commission is not persuaded to grant the request based on the pleadings. Section 309(e) states that if "a substantial and material question of fact is presented, or the Commission for any reason

⁴The Case of California Citizens Band Assoc., Inc. v. United States, 375 F.2d 43 (9th Cir. 1967), is cited by the Commission to show that rules of general applicability can be the basis for denial of individual hearing rights. That case involved the adoption of specific standards equally applicable to 800,000 licensees, with no stated exceptions permitted. No question of waiver was involved.

is unable" to find that the public interest could be served then it shall "designate the application for hearing."

In this case, the Commission was expressly unable to find that the public interest would be served and it has been shown that there were substantial and material questions of fact involved. A hearing is thus called for.

Obviously, this argument does not negate the usefulness of any rule of general applicability as urged by the Commission. Also, this argument does not amount to a claim that an evidentiary hearing can automatically be forced by simply refusing to follow a rule. It does suggest that where the nonduplication rule contemplates an exemption upon a proper public interest showing, then Appellant is entitled to a hearing upon his renewal request if he has raised substantial and material questions of fact and policy.

The Commission's Brief points out (p. 38) that Section 309(e) is designed to guarantee an applicant's right to a hearing before its application can be *denied*. Yet here, the Commission argues, the renewal application of KKHI was *granted* and continued duplication was permitted pending final decision on the exemption request. Thus, there has been no violation of Section 309(e). This argument it is submitted, is a *non sequitur*.

The fact is that Appellant's program proposal was based on AM-FM duplication. The Commission refused to grant the renewal with that proposal but, rather, deferred to a later time any decision on that point. This was not a grant, as requested by Appellant, but rather was a partial grant subject to a later determination on a very key question.

The Commission cannot, by postponing action on the key question to a later time, avoid the requirements of Section 309(e), nor defeat hearing rights guaranteed by that section. Such a decision to postpone consideration of the programming is not simply a question of the Commission's authority to determine "the scope of its own proceedings," as argued by the Commission (p. 38). Rather, there is involved, here, the procedural question of whether by engaging

in piece-meal decisions, hearing rights can be destroyed. Appellant submits that Section 309(e) guarantees the hearing right, no matter what technique the Commission utilizes to dispose of its renewal workload.

Finally, the Commission argues in its Brief that Appellant's reliance on Section 1.110 is misplaced. That rule, according to the Commission, is restricted to situations where an applicant receives "something less than a full authorization." Appellant submits that something "less than full authorization" was in fact granted. But in any event, the Commission's present interpretation cannot act to limit the express applicability of the rule as stated in the rule itself. The rule says:

"Where the Commission without a hearing grants any application in part, or with any privileges, terms, or conditions other than those requested, . . . the action of the Commission shall be considered as a grant of such application unless the applicant shall . . . file with the Commission a written request rejecting the grant as made."

Appellant suggests that it makes little difference whether that which is received is greater than or less than what is requested. The grant is in fact subject to rejection so long as it is made with any "privileges, terms or conditions" other than those requested. In the instant case, the grant was made subject to the condition—later enforced—that Appellant might not be able to duplicate 100% of its programming. The Commission does not dispute Appellant's contention that programming is of the essence of the broadcast service (pp. 25-26 of Appellant's Brief). Hence, to grant the application without approving the program proposal is the equivalent of making a partial grant on terms and conditions other than those requested. Thus, under Section 1.110, when Appellant sought reconsideration of the "partial grant", and specifically rejected the grant as made, it was entitled to the full rights conferred by Section 1.110 of the Rules. These rights, in this case, simply related back to the hearing rights guaranteed under Section 309(e).

In light of the foregoing, it is respectfully submitted that this Honorable Court should judge invalid and set aside the Commission's Memorandum Opinion and Order, released April 27, 1967.

Respectfully submitted,

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